82-914

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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DATED: December 7, 1982

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QUESTIONS PRESENTED

The Seventh Circuit's decision in this distributor non-renewal case raises two fundamental antitrust issues concerning the standards for *per se* condemnation of vertical conduct:

1. Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a *per se* rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?

2. Can a *per se* unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?

The first of these issues presents an important question of law regarding the scope of this Court's *Sylvania* decision.* The second raises a direct conflict in the circuits that the decision below "makes . . . unmistakable."**

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* *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

** *Schwimmer* v. *Sony Corp. of America*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982)(White, J., citing *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), in dissenting from denial of certiorari).

PARTIES TO THE PROCEEDINGS

Petitioner Monsanto Company was appellant below on the issues presented for review. Respondent Spray-Rite Service Corporation was appellee below on the issues presented for review.

Monsanto's non-wholly owned subsidiaries and affiliates are: ACM Services, Inc.; Collagen Corporation; Fisher Controls International, Inc.; Soperton Gum Market, Inc.; Advent Eurofund Limited (UK); Agerquin, S.A. de C.V. (Mexico); Australian Fluorine Chemicals Pty. Limited; Companhia Brasileira de Estireno (Brazil); Companhia Brasileira de Plastico Monsanto (Brazil); Daishin Kogyo K.K. (Japan); Goyana, S.A. Industries Brasileiras de Materias Plasticos (Brazil); Hydrocarbon Products Pty. Ltd. (Australia); Industrias Resistol, S.A. (Mexico); Korag Company Limited (Republic of Korea); Mitsubishi Monsanto Chemical Company (Japan); Monsanto Chemicals of India Limited; Monsanto (Malaysia) Sendirian Berhad; 102957 Canada Limited; Polyamide Intermediates Limited (UK); Revertex Industries Ltd. (N.Z.); and Revinex Australia Limited.

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Petitioner, Monsanto Company, respectfully requests that a writ of certiorari issue to review the judgment and decision of the Court of Appeals for the Seventh Circuit entered on June 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 684 F.2d 1226 and appears as App. A in the Appendix. The District Court's unreported ruling denying Monsanto's motion for a directed verdict appears as App. D.

JURISDICTION

The judgment of the Court of Appeals (App. B) was entered on June 28, 1982. A timely petition for rehearing and suggestion that rehearing be *en banc*, was denied on September 8, 1982. (App. E) Jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . .

STATEMENT OF THE CASE

This petition seeks review of the Seventh Circuit's decision: 1) that certain Monsanto non-price promotional programs and distribution policies were *per se* unlawful based on the *allegation* that they were part of a resale price-fixing conspiracy, and 2) that such a "price-fixing" conspiracy could be inferred solely from evidence that Monsanto, concerned about resale prices, received price complaints from distributors about respondent distributor and did not renew respondent's contract.

There is no contention that Monsanto's promotional programs and distribution policies were unlawful in themselves. Respondent made no showing that these vertical practices adversely affected competition under the *Sylvania* rule of reason standard.[1] Respondent agrees that there was intense intrabrand and interbrand competition in the herbicide market. (Tr. 455, 1182-85, 1323, 2990)[2] It does not dispute that Monsanto was a weak competitor before adopting these practices and agrees that Monsanto's promotional efforts contributed to the improvement of Monsanto's competitive position. (Tr. 2881, 2993-95)

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[1] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[2] The following abbreviations are used in this Petition: "Tr." (trial transcript); "PX" (plaintiff's exhibit); "DX" (defendant's exhibit); and "Brief" (Brief for Defendant-Appellant Monsanto Company before the Seventh Circuit).

Respondent's theory of the case is that Monsanto's vertical practices and the non-renewal were part of a *per se* illegal resale price maintenance conspiracy between Monsanto and one or more unidentified distributors. Based on this *per se* theory the trial court awarded respondent almost $10 million in damages for loss of a business that never earned more than $89,000 in pre-tax profits in the years preceding non-renewal (PX 122-27).[3]

The Seventh Circuit affirmed, applying *per se* standards that conflict with the standards articulated by other circuits. The court did not address whether respondent had proven an overall resale price maintenance conspiracy between Monsanto and its distributors. It held instead that respondent had proven a *per se* unlawful conspiracy to eliminate respondent's price competition based solely on evidence that Monsanto, concerned about its distributors' resale prices, received price complaints from other distributors and later declined to renew respondent. 684 F.2d at 1239, App. A-15 to 16. The court required no further proof of a causal connection between the complaints and non-renewal.

The Seventh Circuit condemned Monsanto's non-price programs and policies, applying a *per se* rule because respondent had alleged that they were part of the purported "price-fixing" conspiracy. It held that this Court's *Sylvania* decision "applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices." 684 F.2d at 1237, App. A-12 (emphasis added). The court made no rule of reason inquiry into the competitive effects of Monsanto's programs and policies, nor did it analyze their relationship to the alleged price-fixing conspiracy.[4]

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[3] Respondent brought this treble damage action under § 4 of the Clayton Act, 15 U.S.C. § 15, asserting a violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Respondent does not claim, and presented no evidence of, any horizontal collusion.

[4] Respondent's damage theory was premised on the aggregate effect of the non-renewal, the various promotional programs and

(footnote continued on next page)

The Herbicide Markets And Monsanto's New Marketing Strategy. In 1968 Monsanto had excellent products, but was a weak competitor in agricultural herbicides and faced entrenched market leaders having as much as a 70% market share. (Tr. 2147, 2881, 3234-35, 3241-43, 3293-94; DX 500-03) It had approximately 3% of the soybean herbicide market and 15% of the corn herbicide market. (Tr. 3293-94; DX 501-02) Monsanto concluded that it needed to improve its competitive position if it was to continue in the herbicide business. (Tr. 3243-44) It therefore instituted a new marketing strategy. (*Id.*) That strategy focused on improving technical knowledge of its products throughout the chain of distribution and on increasing its distributors' promotional efforts with retail dealers, from whom most farmers purchase herbicides. (Tr. 3244-49)

In September 1967 Monsanto announced that distributors would be appointed for one-year terms and evaluated for renewal in late 1968 based on several criteria, including:

1) Whether the distributor's primary activity was soliciting sales to herbicide dealers;

2) Whether the distributor employed trained salesmen capable of carrying out Monsanto's technical education programs with dealers and farmers; and

3) Whether the distributor was adequately exploiting the market for Monsanto products in his area of primary responsibility. (Tr. 3239-40; PX 194)

(footnote continued from preceding page)

policies, and an alleged post-termination group boycott of respondent. Its damage expert testified that he did not separately determine the effect on respondent of each element of the alleged violations. (Tr. 2891-93, 2897) Monsanto disagrees with, but does not seek review of, the Seventh Circuit's decision on the group boycott issue.

Respondent was provided with these evaluation criteria when it was given a new one-year contract in September 1967. (PX 194, 196)

A key element of Monsanto's marketing strategy was the introduction, beginning in late 1968, of incentive compensation programs that paid distributors for selling to dealers and promoting technical understanding of Monsanto's products. (Tr. 1666-70; DX 9 at p. 11) These programs, which the Seventh Circuit condemned as *per se* unlawful, consisted of:

1) Cash payments ranging from $10 to $500 for sending distributor or dealer salesmen to Monsanto technical schools or clinics;

2) Cash payments ranging from $25 to $500 for conducting farmer educational meetings, farmer field tours or demonstration fields;

3) Rebates of 3¢ to 6¢ per 100 pounds on herbicides purchased by the distributor before the herbicide selling season;

4) Rebates ranging from 2¢ to 60¢ per 100 pounds on herbicides sold to dealers (these rebates were conditioned from time-to-time on the distributor's participation in Monsanto's technical marketing schools, its stocking of dealers' shelves early in the herbicide selling season, or its providing customer non-price information to Monsanto).[5] (DX 10, 12, 36, 38)

In addition, in 1968 Monsanto instituted a policy limiting distributors' pickups of product to Monsanto warehouses within each distributor's area of primary responsibility and limiting Monsanto's pre-paid deliveries of product to destinations within that area. (Tr. 1564-65, 2480-81) Monsanto continued its long-standing policy of defining non-exclusive

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[5]The largest cent-per-pound compensation payment amounted to a 1.5% reduction in the distributor's cost. (*Compare* DX 38 at p. 4 *with* DX 19 at p. 3)

areas of primary responsibility for distributors and designating between 10 and 20 distributors to cover each such area. (DX 144, 189, 190, 303, 304, 305, 383)

Respondent has disavowed any claim that these programs and policies were illegal in themselves, agreeing at trial that "if those programs were implemented for Monsanto's own reason without a price fixing conspiracy, there is no contention that those programs . . . are illegal . . . ." (Tr. 3983) Instead, respondent contends that these practices were *per se* unlawful as part of the purported price-fixing scheme. (*Id.*)

Price Behavior in the Herbicide Market. The parties agree that there was intense intrabrand and interbrand competition in the herbicide market, including vigorous price competition, both before and after Monsanto adopted its new marketing strategy. (Tr. 455-56, 692-93, 1465, 3349-53, 2140, 2990, 3413) With rare exceptions, respondent and all other Monsanto distributors sold below—often substantially below—Monsanto's suggested resale prices. (Tr. 226, 398-99, 406-07, 457, 575-77, 1078-83, 1459, 1661-65, 1968-70, 1973, 2139, 2440, 2469-70, 2505, 3559-60, 3610, 3634-36, 3646-47, 3649, 3700, 3732-33, 3779; PX 309; DX 464) One of respondent's witnesses testified that "price cutting was a way of life with distributors." (Tr. 2234) Reflecting interbrand competition, in 1969 Monsanto reduced its base price to distributors on its principal product by 10%. (Tr. 1560, 1678-79, 3298-99; DX 19 at pp. 6-7) This reduced price prevailed throughout the relevant period. (Tr. 3843-44; DX 17-20)

Like all manufacturers, Monsanto was interested in resale price levels in its markets. It used this information to set its own prices and to suggest distributor resale prices at competitive and economically rational levels. (Tr. 1678-79) Monsanto also was concerned that distributor profit margins were adequate to support distributors' participation in Monsanto's promotional and educational programs. (Tr. 1572-74, 1640-43, 1653-58, 1679-81; PX 144 at pp. 14-16, PX 146) While Monsanto suggested resale prices to its distributors, its distributor contracts did not require adherence to those prices. (*See, e.g.*,

PX 201) Nor is there any evidence that any distributor agreed to follow Monsanto's suggested prices.

Monsanto continually received complaints from its distributors, including respondent, regarding other distributors' low resale prices. (Tr. 181, 184, 2471) Such complaints were "standard practice." (Tr. 184) It is undisputed that no distributor ever changed its resale prices as a result of any alleged pressure by Monsanto (Tr. 396-99, 457, 1218-19), despite contradicted evidence that Monsanto threatened respondent and one other distributor with termination. (Tr. 299-303, 618-20, 625-26, 701-03, 710-11, 2509, 3468-69)

Monsanto's Non-Renewal of Respondent. Respondent was a Monsanto distributor from 1957 to 1968. (Tr. 540) Throughout that period it consistently sold Monsanto products below the suggested resale prices. (Stipulation at Tr. 614; Tr. 611, 1218-19) Monsanto was aware of respondent's price-cutting from the outset and received price complaints about respondent between 1964 and May 1967. (Tr. 109-10, 1389-98, 1400-01, 3626-31; PX 185) Nevertheless, Monsanto continued respondent's distributorship for 11 years and gave respondent a new contract in September 1967, four months after receiving the last complaint about respondent's prices. (PX 194, 201)

Respondent employed only one salesman, its principal owner (Tr. 1112-13, 1315-20, 1681-82), and a substantial portion of its sales of Monsanto products were to non-dealers and to customers outside its primary responsibility area. (Tr. 3108; PX 416; DX 454) Although respondent received and understood Monsanto's renewal criteria in late 1967, it did not hire additional salesmen and concentrated on selling to larger customers, rather than to dealers. (Tr. 1048, 1050, 1059, 1063, 1106-07)

In the fall of 1968, *fifteen months after receiving the last price complaint about respondent*, Monsanto decided not to renew its contract. (Tr. 3825-26) Monsanto witnesses testified that Monsanto did so because respondent had failed to hire additional

technically-trained salesmen and to promote adequately the sale of Monsanto products to dealers. (Tr. 2510-15, 3825-26) Respondent's claim is that Monsanto refused to renew its contract because of its price-cutting. (Tr. 767-74)

The Effects of Monsanto's New Marketing Strategy. Monsanto's strategy was successful. By 1972 Monsanto's market share in soybean herbicides had increased from approximately 3% to 19%, and its share in corn herbicides had increased from approximately 15% to 28%. (Tr. 3301; DX 500-03) This improvement in Monsanto's market position was largely at the expense of the market leaders, and the soybean and corn herbicide markets became less concentrated as a result. (Tr. 3301-05; DX 500-03) Thus, the market share of the previously entrenched competitor in corn herbicides decreased from approximately 70% in 1968 to 55% in 1972. (DX 502)

Respondent agrees that Monsanto became a more effective competitor and that the herbicide market became more competitive following Monsanto's introduction of its new marketing strategy. (Tr. 2993-95) Its expert testified that the compensation programs tended to focus distributors' sales efforts on dealers and that Monsanto's promotional efforts and emphasis on technical selling contributed to the improvement in Monsanto's competitive position. (Tr. 2675, 2679, 2993-95)

The Seventh Circuit's Decision. Monsanto appealed from, *inter alia*, the denial of its motion for a directed verdict on the price-fixing and wrongful termination claims. (App. D; Brief at pp. 46-56) Although respondent's case was grounded on the existence of an overall resale price maintenance conspiracy, the Seventh Circuit did not address whether respondent proved such a conspiracy. Instead, it held that a *per se* unlawful conspiracy to reduce resale price competition could be based solely on the circumstances surrounding respondent's non-renewal.[6] The court acknowledged that respondent

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[6] Because the Seventh Circuit held that respondent established a conspiracy based on the non-renewal, it declined to consider whether there was sufficient evidence that Monsanto effectuated

(footnote continued on next page)

"was only able to show that Monsanto was concerned about the resale price of its herbicides and that it received some price complaints about [respondent] from other distributors." 684 F.2d at 1238, App. A-14. Nevertheless, the court held that "[p]roof of distributorship termination in response to competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action." *Id.* at 1239, App. A-15 to 16 (citations omitted).

The Seventh Circuit held that respondent had satisfied this standard with evidence that: *first*, Monsanto "received numerous complaints" about respondent's low prices; *second*, "some distributors requested that Monsanto terminate" respondent;[7] *third*, Monsanto "was concerned about stabilizing the resale price of its herbicides and . . . considered Spray-Rite a price-cutter;" *fourth*, various Monsanto managers "threatened to terminate [respondent's] distributorship if [it] did not raise [its] prices;" and *fifth*, Monsanto did not renew respondent's contract. *Id.* at 1239, App. A-16. Recognizing a conflict in the circuits on the legal standard, the court expressly declined to follow the Third Circuit's decision in *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), which rejects the conspiracy standard adopted in this case. 684 F.2d at 1238, App. A-15.

(footnote continued from preceding page)

resale price maintenance by coercing distributors into adhering to suggested resale prices. 684 F.2d at 1240 n.9, App. A-17.

[7] The court's characterization of the record regarding requests for respondent's termination is mistaken. *There is no evidence that any distributor requested respondent's non-renewal.* Nor does the record support the Seventh Circuit's statement that a Monsanto employee told respondent it was terminated because of price complaints. *Compare* 684 F.2d at 1239, App. A-17 *with* Tr. 774. Finally, under the conspiracy standard applied by the court, threats of termination are irrelevant to the conspiracy issue. *See* 684 F.2d at 1239, App. A-15 to 16.

Monsanto also appealed from the denial of its motion for a directed verdict with respect to its compensation programs and distribution policies, premised on the lack of evidence connecting them with any alleged resale price-fixing scheme.[8] (Brief at pp. 28-32) Monsanto also argued that the trial court erred by refusing to test those practices under the *Sylvania* rule of reason. (*Id.*) The Seventh Circuit rejected Monsanto's reliance on *Sylvania* as "misplaced," holding that the mere allegation that Monsanto's programs and policies were part of a price-fixing conspiracy mandated a *per se* rule:

> *United States* v. *Sealy* rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices. Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of an

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[8] The jury returned a general verdict against Monsanto and answered affirmatively the following special interrogatory:

> Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices on Monsanto herbicides?

Monsanto initially sought separate interrogatories addressed to each of the three elements of Monsanto's programs and policies. When this request was refused, Monsanto objected to the inclusion of "or" in the interrogatory, on the ground that respondent's damage theory required the jury to find that all three elements were the result of an unlawful conspiracy. (Tr. 4335-37) Respondent's expert testified that he did not separately determine the effect on respondent of each of these elements and admitted that the jury would be unable to determine the amount of damage caused by each of them. (Tr. 2892-93, 2897) In light of this damage evidence, the special interrogatory and accompanying instructions permitted the jury to award respondent damages for programs and policies that the jury may well have concluded were not unlawful.

> unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the *per se* rule.[9]

684 F.2d at 1237, App. A-12 (emphasis added)(citations omitted). Because the court held that the bare allegation of a connection with price-fixing compelled application of a *per se* rule, it did not inquire into the competitive effects of Monsanto's practices. Nor did it analyze their relationship to the alleged price-fixing.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision expands the legal standards for *per se* condemnation of vertical conduct in two important areas. *First*, it holds that the mere allegation that non-price vertical restrictions are part of a resale price-fixing scheme is enough to render the *Sylvania*[10] rule of reason inapplicable and prescribe application of a *per se* rule. *Second*, it permits the inference of a *per se* unlawful conspiracy to fix resale prices solely from evidence that a manufacturer, concerned about resale prices, did not renew a distributor following price complaints from competing distributors.

On the non-price restrictions issue, the decision below presents an important question of federal antitrust law which this Court should decide. The decision discards the rule of reason where there is a mere incantation of "price-fixing," rendering irrelevant the actual economic and competitive effects of the challenged non-price restrictions. It thereby violates this Court's admonition in *Sylvania* "mak[ing] clear that departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing." 433 U.S. at 58-59.

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[9]The court distinguished other decisions applying the rule of reason on the ground that "the plaintiffs in those cases *failed to allege* that the distributors' territorial restrictions were ancillary to *per se* unlawful price-fixing schemes." 684 F.2d at 1238 n.6, App. A-13 (emphasis added).

[10]*Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 443 U.S. 36 (1977).

More fundamentally, the decision below invites nullification of this Court's *Sylvania* decision and retards the procompetitive development of federal antitrust law on "this subject of considerable commercial importance." 433 U.S. at 36. This Court's reinstatement of the rule of reason in *Sylvania* was grounded on the recognition that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products" and that "[i]nterbrand competition . . . is the primary concern of antitrust law." 433 U.S. at 54, 52 n.19. The decision below, by prescribing a *per se* rule where price-fixing merely is alleged, largely restores the antitrust risk faced by manufacturers in the *Schwinn* era.[11] It necessarily will inhibit much of the procompetitive innovation in vertical distribution restrictions spawned by *Sylvania*.

On the conspiracy issue, the Seventh Circuit's decision sharpens a clear conflict in the circuits. As Justice White recently stated, the decision in this case "makes this conflict unmistakable."[12] It aligns the Seventh Circuit with the Eighth Circuit and against five other circuits in holding that conspiracy can be inferred from the termination of a distributor against a backdrop of price concerns and price complaints, without further evidence of a causal connection between the complaints and the termination. As Justice White has pointed out, "[b]ecause illegal conspiracies can rarely be proved through evidence of explicit agreement, but must usually be established through inferences from the conduct of the alleged conspirators, this disagreement in the circuits over the nature of proof required is especially significant." 51 U.S.L.W. at 3362

The conspiracy rule also is antithetical to sound antitrust policy and will have a chilling effect on procompetitive market conduct. By diluting the standard for proving a

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[11] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

[12] *Schwimmer* v. *Sony Corp. of America*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982)(White, J., dissenting from denial of certiorari).

price-fixing conspiracy, the decision below will constrain the freedom of manufacturers to terminate or replace distributors in the interest of improving distribution efficiency or implementing competitive marketing strategies. Indeed, the factors on which the court's conspiracy standard is based —manufacturer price concern and price complaints from competing distributors—are most likely to arise where, as here, the manufacturer has adopted a competitive marketing strategy emphasizing promotional activities by distributors.

By reviewing the decision below, this Court can provide much needed guidance on these two related and unsettled antitrust issues and can amplify the meaning of one of its most widely acclaimed antitrust decisions.

POINT I

The mere allegation that non-price vertical restrictions are part of a resale price-fixing scheme does not justify application of a *per se* rule.

The Seventh Circuit's decision confines this Court's *Sylvania* decision to cases where "there is no allegation that the territorial restrictions are part of a conspiracy to fix prices." 684 F.2d at 1237, App. A-12. Where such an allegation is made, it holds that "*Sealy* and its progeny prescribe the *per se* rule." *Id.*, App. A-12. Applying that legal standard, the court condemned Monsanto's compensation programs and distribution policies without inquiry into their competitive effects or analysis of their relationship to the alleged price-fixing. It did so on a record demonstrating intense interbrand and intrabrand competition and lacking any evidence linking those practices to the alleged price-fixing.

The legal standard articulated by the Seventh Circuit is manifestly contrary to federal antitrust policy and, if permitted to stand, will substantially undermine *Sylvania*. The application of *per se* rules cannot be made to turn on mere allegations. This Court's antitrust decisions repeatedly have emphasized that the classification of particular conduct as *per se* unlawful must be based on a careful analysis of its

substance and competitive impact, not on formalism.[13] Basing a *per se* rule on the bare allegation that practices are part of a price-fixing scheme is the ultimate formalism. An allegation simply is not a rational criterion for identifying "practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal." *Northern Pacific Railway Co.* v. *United States,* 356 U.S. 1, 5 (1958).

This Court has not considered the legality of non-price vertical restrictions in the context of resale price maintenance since *White Motor Co.* v. *United States*, 372 U.S. 253 (1963).[14] In that case the Court refused to apply a *per se* rule to defendant's territorial and customer restrictions, despite an uncontested finding of unlawful price-fixing. The Court did not regard the presence of price-fixing as dispositive because the trial court had made no finding that the restrictions were related to the price-fixing:

> In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States* v. *Bausch & Lomb*

[13] *See, e.g., Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9, 19-20 (1979); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977).

[14] The Court did not address the issue in *Sylvania,* where price-fixing claims were resolved against plaintiff at trial and not raised in this Court. *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 373 (1967), which *Sylvania* overruled, contains dictum that "if there were here a finding that the restrictions were part of a scheme involving unlawful price fixing, the result would be a *per se* violation of the Sherman Act." The *Schwinn* decision did not define what relationship must exist between the price-fixing and the non-price restrictions, but variously referred to the *per se*-tainted restrictions as those "accompanied by," "part of," "ancillary to," "an integral part of," encumbered by, or intermixed with illegal price-fixing. *Id.* at 373, 375, 380, 381.

Co., 321 U.S. 707, where price fixing was "an integral part of the whole distribution system" (*id.*, 720) including customer restrictions. No such finding was made in this case; and whether or not the facts would permit one we do not stop to inquire.

372 U.S. at 260. Examining the evidence of price-fixing, the Court concluded that "[w]ithout more detailed findings we . . . cannot say that the case is governed by *United States* v. *Bausch & Lomb, supra.*"[15] *Id.* at 260-61.

United States v. *Sealy, Inc.*, 388 U.S. 350 (1967), upon which the Seventh Circuit based its mere allegation rule, is doubly inapposite. First, this Court's condemnation of the territorial restrictions in that case as "part of the unlawful price-fixing and policing" was grounded on "specific findings of the District Court [that] they gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions." *Id.* at 356. The Seventh Circuit rule requires no such analysis of any connection between the non-price restriction and price-fixing. Second, the territorial restrictions in *Sealy* were "the product of a horizontal arrangement." *Id.* at 352. The fundamentally different competitive implications of horizontal and

[15] The issue in *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707 (1944), was not whether non-price vertical restrictions were tainted with the *per se* illegality of price-fixing, but whether defendant's *resale price maintenance agreements and Fair Trade Agreements* with its wholesalers were properly enjoined. The Court alternatively held that those price-fixing agreements with *wholesalers* were unlawful in themselves and were properly found to be an integral part of concededly illegal resale price and customer restraints on *retailers*. *Id.* at 719-21. The Court sustained the trial court's finding "that a conspiracy to maintain prices down the distribution system existed between the wholesalers and [defendant]" based on substantial evidence that defendant utilized its price-fixing agreements with wholesalers to effectuate the illegal price controls on retailers. *Id.* at 720.

vertical restraints are well recognized, and horizontal allocations of markets have long been regarded as *per se* unlawful in their own right.[16] The practices in this case are vertical.

Nothing in these or other decisions of this Court suggests that the naked allegation of a connection with price-fixing is enough to justify application of a *per se* rule to non-price restrictions. Indeed, *White Motor* recognized the need for properly supported findings connecting the challenged practices with unlawful price-fixing, and both *Bausch & Lomb* and *Sealy* were predicated on such findings.

Decisions in the courts of appeals also have required adequate proof linking territorial or customer restrictions to unlawful resale price maintenance before a *per se* rule can be applied.[17] In the absence of such proof, those courts have applied the rule of reason.[18] While no other circuit has adopted a rule so sweeping as the Seventh Circuit's mere allegation rule, there is confusion in the circuits regarding the actual relationship necessary to condemn non-price

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[16] *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57-58 nn.27-28 (1977); *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 608 (1972); *United States* v. *Sealy, Inc.*, 388 U.S. 350, 353-54 (1967); *White Motor Co.* v. *United States*, 372 U.S. 253, 261, 263 (1963).

[17] *See, e.g., Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 945 n.6 (5th Cir. 1975); *Sandura Co.* v. *Federal Trade Commission*, 339 F.2d 847, 859 (6th Cir. 1964). *See also Snap-On Tools Corp.* v. *Federal Trade Commission*, 321 F.2d 825, 830-33 (7th Cir. 1963). In *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147, 1153 (7th Cir. 1978), another panel of the Seventh Circuit refused to distinguish *Sylvania* because "this case was not tried on a theory that the restraints 'were ancillary to an illegal price fixing scheme' . . . and the record is insufficient to support our making such a finding." Here, the Seventh Circuit held *General Beverage* "inapposite" because the plaintiff in that case "failed to allege that the distributors' territorial restrictions were ancillary to *per se* unlawful price-fixing schemes." 684 F.2d at 1238 n.6, App. A-13.

[18] *See, e.g., Sandura*, 339 F.2d at 853-57; *Snap-On Tools*, 321 F.2d at 831-33.

restrictions as ancillary to *per se* unlawful resale price maintenance.[19]

The pernicious and illogical result of the Seventh Circuit's *per se* rule could not be more clear than in this case. Because it regarded the allegation of a connection with price-fixing determinative, the Seventh Circuit made no analysis of the actual competitive effects of Monsanto's compensation programs and distribution policies or of their relationship to the alleged price-fixing. Had it done so under appropriate legal standards, the court would have been compelled to reverse.

In contrast to those cases where non-price restrictions were condemned as ancillary to price-fixing, there is no evidence in this case that Monsanto's programs and policies were adopted or employed with the intent or effect of fixing resale prices. Nor is there any evidence that Monsanto communicated with any distributor before adopting them. To the contrary, there is unrebutted evidence that they were unilaterally adopted by Monsanto. (Tr. 1666-73, 1680-81, 3243-46) Respondent presented no evidence explaining how the Monsanto programs and policies supported or logically could support resale price maintenance. Its expert testified that, because some of Monsanto's compensation programs encouraged sales to dealers, they would tend to discourage sales to non-dealers and would influence distributors' resale prices to non-dealers. (Tr. 2674-77, 2679, 2908-09) He identified only one hypothetical circumstance where sales to non-dealers might be discouraged and did not explain how this would support resale price maintenance.[20] (Tr. 3019-20) Regarding

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[19] Several decisions suggest that a tenuous relationship may suffice. *See, e.g., Blankenship* v. *Hearst Corp.*, 519 F.2d 418 (9th Cir. 1975); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975). The better reasoned decisions require that the territorial or customer restrictions have been adopted or utilized with the purpose or effect of implementing a resale price maintenance scheme. *See, e.g., Sandura*, 339 F.2d at 859; *Snap-On Tools*, 321 F.2d at 830.

[20] This hypothetical situation is where the product is in short supply and the distributor faces a choice between selling the

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Monsanto's primary responsibility areas and shipping policy, respondent's expert opined that they "precluded" distributors from selling outside their designated areas. (Tr. 2668) However, respondent presented no evidence explaining how these policies (even if they had that effect) would achieve resale price maintenance, given Monsanto's practice of designating between 10 and 20 distributors for each primary responsibility area.

Belying these unsupported opinions is uncontested evidence from the marketplace that vigorous intrabrand price competition continued after Monsanto introduced its compensation programs and shipping policy (Tr. 455, 1465, 2990, 3351, 3413), and that distributors continued to sell large quantities of Monsanto products to non-dealers and to customers outside their areas of primary responsibility. (Tr. 1145, 3601-03, 3729-31; PX 133; DX 189, 190, 287, 288, 463, 466)

The condemnation of Monsanto's non-price practices under a *per se* rule is all the more egregious because of the nature of those practices and their demonstrated beneficial effect on interbrand competition.[21] If those practices were tested under the appropriate rule of reason standard, the record could not sustain a finding of illegality. Indeed, the record is replete with evidence, including testimony by respondent's owner, expert and other witnesses, of vigorous intrabrand and interbrand competition in herbicides, both before and after Monsanto adopted the challenged practices.[22] There simply is no dispute that the herbicide market has been intensely competitive and became less concentrated after

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available supply to a dealer or to a non-dealer. Respondent's expert conceded that when product was in ample supply, as it was virtually without exception, Monsanto's programs would not cause a distributor to decline a sale to a non-dealer. (Tr. 2908-13)

[21] *See supra* pp. 4-6, 8.

[22] *See supra* pp. 6, 8.

Monsanto implemented its new marketing strategy. Understandably, respondent presented no evidence that Monsanto's programs and policies adversely affected competition and disavowed any claim that they were unlawful in themselves.

In short, the non-price practices condemned here as *per se* illegal have precisely the "redeeming virtues" that convinced this Court to restore the rule of reason in *Sylvania.* 433 U.S. at 54. They "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products" and "induce [distributors] to engage in promotional activities . . . necessary to the efficient marketing of [his] products." *Id.* at 54-55.

The Seventh Circuit's *per se* condemnation of Monsanto's practices cannot fail to have a chilling effect on manufacturers' use of non-price vertical practices. A manufacturer who institutes non-price innovations is always vulnerable to a facile claim that they restrict intrabrand price competition, particularly where they are used in a marketing strategy emphasizing competition on other factors as well as price. So long as juries are permitted to speculate whether such non-price practices have the purpose or effect of "price-fixing," the manufacturer who employs them always risks treble damage liability. The Seventh Circuit's decision multiplies that risk, first, by prescribing a *per se* rule based on a mere allegation of price-fixing and, second, by diluting the standard for proving a "price-fixing" conspiracy. Thus, the decision substantially undermines the procompetitive benefits this Court sought to achieve in *Sylvania.*[23]

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[23] The resulting threat to the *Sylvania* doctrine has been succinctly described:

> Because of the enormous attraction of litigating under a per se rule, virtually every plaintiff now alleges that nonprice restrictions are horizontal and that vertical restrictions are intended to control price. These distinctions have caused considerable confusion in the lower courts, confusion that threatens to obscure the analytically important insights of *Sylvania* itself.

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POINT II

A *per se* illegal conspiracy cannot be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract.

The Seventh Circuit's decision permits the inference of a *per se* unlawful conspiracy from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and did not renew the distributor's contract. 684 F.2d at 1239, App. A-15 to 16. The Seventh Circuit thus joins the Eighth Circuit[24] in permitting the inference of a vertical conspiracy based upon those factors without further evidence of a causal connection between the competitor complaints and the manufacturer's termination decision. This standard is directly contrary to the standards applied by five other circuits.[25] The practical effect of this minority rule is to expose a manufacturer to *per se* liability whenever it terminates or elects not to renew a distributor.

Absent from this case are any of the recognized indicia of a resale price-fixing conspiracy. *First*, there is no claim or evidence that Monsanto entered into contracts with its distributors embodying resale price maintenance provisions. *Second*, there is no evidence of any consensual agreement between Monsanto and any distributor to fix or maintain resale prices. *Third*, there is no evidence that any distributor acquiesced in any price coercion by Monsanto. *Fourth*, there

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Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?* 67 VA. L. REV. 1457, 1463 (1981). *See also* Letter from Assistant Attorney General William F. Baxter to Congressman Robert McClory (August 17, 1982), 5 TRADE REG. REP (CCH) ¶ 50,442 at 56,012-13.

[24] *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982).

[25] *See infra* pp. 24-26.

is no evidence of price uniformity among distributors or adherence to suggested resale prices. *Fifth*, there is no claim or evidence that Monsanto's distributors horizontally conspired to fix resale prices or that Monsanto joined in any such conspiracy. Rather, the Seventh Circuit, applying a new *per se* rule, held that respondent had proven a conspiracy based on the termination of a single distributor where the manufacturer, concerned about resale prices, had received price complaints from competing distributors. 684 F.2d at 1234, 1239, App. A-6, 15 to 16.[26]

The Seventh Circuit's conspiracy standard is fundamentally flawed. It permits an inference of conspiracy solely from evidence that is no more probative of conspiracy than of lawful unilateral action based on the manufacturer's economic self-interest.[27] In *First National Bank* v. *Cities Service Co.*,

[26] This new *per se* rule post-dates *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), and has its genesis in the Third Circuit's decision in *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164 (3d Cir. 1979). The *Cernuto* principle goes beyond the traditional resale price maintenance *per se* rule. It condemns as *per se* unlawful the termination of a distributor for price reasons pursuant to an inferred agreement with another distributor, on the ground that this action might reduce or eliminate intrabrand resale price competition. Virtually all vertical conduct, including the non-price restraints examined by this Court in *Sylvania*, may affect intrabrand price competition. The validity of the *Cernuto per se* rule is thus itself open to question.

[27] The issue here is the counterpart to that in horizontal conspiracy cases based on conscious parallelism. In that context parallel business behavior alone is insufficient to create a jury issue on conspiracy for precisely the same reason: parallel conduct is consistent with inferences of both conspiracy and legitimate unilateral conduct and is probative of neither. *See, e.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280 (1968); *Theatre Enterprises* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). This Court recently agreed to consider a case which presents the question, among others, of what additional evidence is necessary to infer a horizontal conspiracy. *Weyerhaeuser Co.* v. *Lyman Lamb Co.*,

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391 U.S. 253 (1968), this Court held that a conspiracy cannot be inferred from evidence which makes the inference of conspiracy no more plausible than the inference of unilateral action:

> [N]ot only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, *thus negating the probative force of the evidence showing such a failure*, but the former inference is more probable.

391 U.S. at 280 (emphasis added). *See also Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 114 (3d Cir. 1980) (in a vertical conspiracy case, plaintiff's failure to demonstrate that defendant's action contradicted its economic self-interest "negates an inference of concerted action"), *cert. denied,* 451 U.S. 911 (1981).

The Seventh Circuit ignored that a manufacturer legitimately may be concerned that distributor price-cutting will undermine its marketing strategy and unilaterally may terminate a price-cutter for that reason.[28] It also ignored that complaints by distributors about other distributors' price-cutting are inherent in any competitive market and are a typical source of a manufacturer's knowledge about its distributors' practices. Price concerns and competitor complaints are particularly consistent with unilateral termination where, as here, the manufacturer has adopted a marketing strategy emphasizing promotional activities by

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___ U.S. ___, 102 S. Ct. 2232 (1982) (*cert. granted*). This case provides the Court with an opportunity to clarify conspiracy standards in the vertical context as well.

[28] It is of course settled that purely unilateral conduct by a manufacturer is lawful even if that action would be illegal *per se* if undertaken pursuant to a conspiracy. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).

distributors. Such programs typically require expenditures of time and capital by distributors. They therefore create an obvious temptation for some distributors to disregard the manufacturer's marketing strategy, avoid the costs associated with engaging in promotional activities, and "free ride" on the efforts of those distributors who carry out the manufacturer's strategy.[29] *See Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199-1201 (6th Cir. 1982). By avoiding these costs, the free-rider can undercut the prices of those distributors who carry out the strategy and endanger the strategy itself. *See* Meehan & Larner, *A Proposed Rule of Reason for Vertical Restraints on Competition*, 26 ANTITRUST BULL. 195, 202-02, 203-04, 207-11 (1981); White, *Vertical Restraints in Antitrust Law: A Coherent Model*, 26 ANTITRUST BULL. 327, 332, 336-38 (1981).

The likely reactions to this price-cutting are predictable. Distributors adopting the manufacturer's strategy will complain about the free-riding price-cutter. The manufacturer will be concerned that the free-rider will drive down distributor profit margins, undermining other distributors' ability and incentive to implement promotional programs. The manufacturer's ability to attract and retain good distributors will be adversely affected. Ultimately, the manufacturer's marketing strategy may collapse because of distributor rebellion or disaffection.

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[29] The free-rider problem is particularly acute where, as here, distributors do not have exclusive territories, numerous distributors are assigned to the same primary marketing area, and the promotional efforts of one distributor quite naturally redound to the benefit of others. *See* Meehan & Larner, *A Proposed Rule of Reason for Vertical Restrictions on Competition*, 26 ANTITRUST BULL. 195, 210-11 (1981). *Cf.* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 285 (1975).

These reactions are inherent in any marketing strategy emphasizing promotional programs and non-price competition:

> If a supplier wants his distributors to emphasize nonprice rather than price competition, which as we said is the usual reason why he would restrict his distribution, he will be hostile to price cutters because they will make it harder for his other distributors to recoup the expenditures he wants them to make on presale services to consumers and on other forms of nonprice competition, and of course the undersold distributors will be equally or more hostile.

Valley Liquors, Inc. v. *Renfield Importers, Ltd.* 678 F.2d 742, 744 (7th Cir. 1982). "The motive of supplier and distributors alike could thus be described as wanting to eliminate price cutters . . . ." *Id.* But these normal marketplace reactions are not probative of conspiracy absent evidence that the manufacturer was "acceding" to the complaining distributor's desires in terminating the price-cutter "rather than acting to promote an independent conception of its self-interest." *Id.*

The conspiracy standard adopted in this case conflicts with the decisions of other circuits, and the need for this Court's guidance is manifest.[30] Marshalled against the Seventh and

[30]This Court recently denied certiorari in *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982) and *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, 685 F.2d 41 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982). In his dissent from that denial, Justice White observed that the quality of proof necessary to raise a jury question in this context is one "on which the lower courts are divided. . . . The opinion for the Seventh Circuit in Spray-Rite Service Corp. v. Monsanto Corp., [684] F.2d [1226], [1238-39] (1982), makes this conflict unmistakable . . . . " 51 U.S.L.W. at 3362 & n.1 (White, J., dissenting from denial of certiorari).

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Eighth Circuits are decisions in the First, Second, Third, Sixth, and Tenth Circuits. The Seventh Circuit acknowledged a direct conflict, expressly declining to follow the Third Circuit's opinion in *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). In *Sweeney*, the Third Circuit held that a finding of conspiracy must be premised upon "proof of a causal relationship between competitor complaints" and the challenged conduct of the manufacturer. *Id.* at 111.

The circuits in conflict with the Seventh Circuit have held that the inference of conspiracy solely from evidence of price concerns and price complaints is unwarranted because a manufacturer may have legitimate independent reasons for terminating the distributor, including a concern about free-riders. *See, e.g., Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199 (6th Cir. 1982)(defendant's "refusal to sell was a refusal consistent with the need to prevent free riders" and cannot be the basis for a conspiracy even in the context of price complaints by other distributors); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 956 (2d Cir. 1982) (complaints from distributors about terminated distributor's price-cutting and transshipping policies and manufacturer's dislike for those policies is not sufficient to infer concerted action), *cert. denied*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 943 (2d Cir. 1981), quoting *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 112 (2d Cir. 1975)(a manufacturer's concern about the "possible alienation" of its distributors "is a legitimate basis for independent protective action on its part, which cannot be viewed as conspiratorial in the absence of some evidence of tacit understanding with [the distributor's] competitors. Mere pressure by [distributors] themselves would not provide a basis for such an inference"), *cert. denied*, 51 U.S.L.W. 3258 (U.S. Oct. 5, 1982). *See also Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840 (10th Cir. 1981); *Oreck Corp.* v. *Whirlpool Corp.*, 639 F.2d 75, 80 (2d Cir. 1980), *cert. denied*, 4[illegible] 1083 (1981); *Edward J. Sweeney & Sons,*

Inc. v. *Texaco, Inc.*, 637 F.2d 105, 114 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

A manufacturer's valid concern for its marketing strategy is not the only factor that the other circuits have considered in determining whether there was sufficient proof of a causal connection between price complaints and termination. Another important consideration is whether the price complaints were sufficiently contemporaneous with termination to support the inference that they were the cause of the manufacturer's action. *See, e.g., Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 855 (1st Cir. 1982); *Edward J. Sweeney & Sons* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Also relevant is whether the complaining distributors had coercive power over the manufacturer and whether there were *requests* for termination by the distributors.[31] *See, e.g., Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1198-99 (6th Cir. 1982); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 845 (10th Cir. 1981); *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 168 (3d Cir. 1979).

The other circuits' consideration of these causal factors is grounded in the recognition that price complaints are common and that a manufacturer's concern about resale prices is natural and legitimate. Thus, the inference of a conspiracy to terminate a distributor for price-related reasons cannot be based on these two factors alone. Yet it is precisely these two factors that the Seventh Circuit held sufficient.

In so holding, the Seventh Circuit ignored important, undisputed evidence negating the plausibility of the conspiracy inference:

- That Monsanto had continued respondent's distributorship from 1957 until late 1968, though it was always aware that respondent was a price-cutter and received price complaints about respondent from other

[31] There is no evidence that distributors requested respondent's termination or had the power to force Monsanto to accede to any such request. *See supra* p. 9 n.7.

distributors beginning at least as early as 1964. (Tr. 109-10, 1389-98, 1400-01, 3626-31)

- That Monsanto had announced in late 1967 that distributors would be evaluated for renewal based upon their promotional efforts with dealers and employment of trained salesmen capable of carrying out Monsanto's technical education programs. (Tr. 3237-40; PX 194)

- That respondent failed to carry out key elements of Monsanto's strategy by not hiring technically-trained salesmen and failing to emphasize the sale of Monsanto products to dealers. (Tr. 40, 48, 1050, 1059, 1063, 1106-07)

- That it was not until after Monsanto had announced its renewal criteria and respondent had failed to satisfy key elements of those criteria that Monsanto decided not to renew respondent's distributorship. (Tr. 3825-26)

- That the final price complaint about respondent occurred more than one year before its non-renewal and that Monsanto had renewed respondent's distributorship after that last complaint. (Tr. 1389-98; PX 185, 194, 201)

The Seventh Circuit justified its disregard of this evidence on the ground that, while "the evidence concerning Monsanto's reasons for terminating Spray-Rite was conflicting, the jury was not required to accept Monsanto's version of the case." 684 F.2d at 1239, App. A-17. But this begs the question. The issue before the Seventh Circuit was not whom the jury believed, but whether the conspiracy issue should have gone to the jury at all. Under a correct standard, it should not have. The undisputed evidence disregarded by the court not only negates the inference of conspiracy, but makes more probable the inference that Monsanto decided not to renew respondent for its own independent reasons. *See First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280 (1968).

The anticompetitive potential of the Seventh Circuit's decision is most apparent where, as here, marketing strategies emphasizing promotional efforts by distributors are implemented in a market characterized by vigorous interbrand and intrabrand competition. In that context, where a manufacturer is legitimately concerned about free-riders and is powerless to prevent normal price complaints from distributors, the risk posed by this decision may immobilize manufacturers from terminating free-riders. *See* Posner, *The Next Step in Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6, 13 (1981).[32] The Seventh Circuit's dilution of the standard for proving a resale price-fixing conspiracy thus compounds the risk that procompetitive non-price practices will be condemned as *per se* unlawful based on a mere allegation of "price-fixing." If permitted to stand on either question presented, the Seventh Circuit's decision cannot fail to undermine the procompetitive benefits this Court sought to achieve in *Sylvania*.

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[32] More generally, the Seventh Circuit rule may permit a distributor who has previously been identified as a price cutter to "violate lawful provisions of the dealership agreement with impunity, because the enforcement of *any* provisions against it may be deemed to have been motivated by its discounting." 48 U. CHI. L. REV. at 12.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

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DATED: December 7, 1982

APPENDIX A

APPENDIX A

IN THE

United States Court of Appeals

For the Seventh Circuit

Nos. 80-1621, 80-2232, 80-2233, and 80-2624

SPRAY-RITE SERVICE CORPORATION, an Iowa corporation,

Plaintiff-Appellee,

v.

MONSANTO COMPANY, a Delaware corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Western Division. No. 72-C-12—**Stanley J. Roszkowski**, *Judge.*

Argued May 15, 1981—Decided June 28, 1982

Before BAUER, *Circuit Judge*, NICHOLS, *Associate Judge*,* and WOOD, *Circuit Judge.*

BAUER, *Circuit Judge.* Spray-Rite Service Corporation ("Spray-Rite") brought this antitrust action against Monsanto Company alleging that Monsanto combined and conspired with some of its distributors to fix the resale price of Monsanto herbicides in violation of section 1 of the Sherman

* The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

Act, 15 U.S.C. § 1. Spray-Rite's cause of action was tried to a jury before the Honorable Stanley J. Roszkowski. On February 21, 1980, the jury returned a verdict against Monsanto and awarded Spray-Rite $3,500,000. The district court trebled the verdict pursuant to 15 U.S.C. § 15. The Clerk of the District Court entered judgment the following day of "$10,500,000.00 plus interest at the legal rate." On March 11, 1980, Spray-Rite moved to amend the judgment to assess costs and attorneys' fees. The court granted Spray-Rite's motion on March 21, 1980.

The four separate appeals from the judgment below have been consolidated in this court. Monsanto appeals in 80-1621 from the order granting Spray-Rite's motion to amend the judgment to assess costs and attorneys' fees, and it appeals in 80-2232 from the verdict against it. Monsanto appeals in 80-2624 from the order awarding Spray-Rite $895,747.80 in attorneys' fees. Spray-Rite cross-appeals in 80-2233 from the original judgment to the extent that it failed to assess costs and attorneys' fees. We affirm the amended judgment against Monsanto, dismiss Spray-Rite's cross-appeal, and affirm in part and reverse and remand in part the award of $895,747.80 in attorneys' fees.

Facts

Spray-Rite was engaged in the wholesale agricultural chemical distribution business from 1957 to 1972. Donald Yapp, Spray-Rite's owner and president, was the company's sole salaried salesman. Spray-Rite bought insecticides and herbicides from competing manufacturers, including Monsanto, and resold products to dealers and farmers.

Between 1957 and 1968, Monsanto manufactured two herbicides: Randox and Ramrod; it introduced a third product, Lasso, in 1968. Monsanto markets its herbicides primarily through independent, non-exclusive distributors. Monsanto assigns each distributor a geographic area of primary responsibility, but the distributors may sell outside that area. Approximately ten to twenty distributors are assigned to each area.

Monsanto sent a letter to each of its distributors in 1967 announcing that it would immediately appoint distributors for one year terms expiring automatically unless renewed by Monsanto. The letter described Monsanto's newly adopted criteria for evaluating distributor performance: (1) whether the distributor's primary activity was soliciting sales to herbicide dealers; (2) whether the distributor employed trained personnel capable of carrying out Monsanto's technical programs with dealers and farmers;[1] and (3) whether the distributor was fully exploiting the herbicide market in its area of primary responsibility. Yapp received the letter describing the evaluation criteria along with his one-year distributorship contract for 1967-68.

Monsanto notified Spray-Rite in 1968 that it would not renew Spray-Rite's distributorship. Of Monsanto's approximately 100 distributors, Spray-Rite was its tenth largest Ramrod distributor. Ninety percent of Spray-Rite's sales volume was devoted to herbicide sales, 16% of its sales were of Monsanto products, and 18% of its profits were derived from its Monsanto sales during the 1967-68 season.

Monsanto made several changes in its herbicide business after the 1967-68 season. In addition to introducing Lasso, Monsanto reduced the distributor and suggested resale prices of Ramrod and changed the suggested distributor profit margin from 11% to approximately 7%. Monsanto also adopted new shipping and pick-up policies. It made free deliveries to the Monsanto warehouse within the distributor's area of primary responsibility, but the distributor had to assume the additional shipping costs if it resold the products outside its primary area. Monsanto's new compensation programs included cash bonus payments to distributors for participating in Monsanto's technical schools and demonstrations. Monsanto expanded the compensation programs in

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[1] Monsanto's technical programs consist of instructing dealers and farmers on herbicide usage and effectiveness. Monsanto expects its distributors to provide salesmen to staff these programs.

1970 and 1972 to include distributor price discounts on herbicides resold to dealers who had attended Monsanto's technical programs. Monsanto also gave price discounts, which were rebated to the distributor at the end of the season, on orders purchased early in the season.

Spray-Rite attempted to purchase Monsanto herbicides from other distributors after its distributorship was terminated.[2] It was unable to purchase any Lasso at all during the 1968-69 season. It did obtain some Ramrod, but not so much as it desired or so early in the season as it needed. Spray-Rite went out of business in 1972. It contends that Monsanto's unlawful business practices drove it out of business.

Spray-Rite claims that Monsanto and some of its distributors conspired to fix the resale price of Monsanto herbicides. Spray-Rite contends that Monsanto terminated Spray-Rite's distributorship, adopted compensation programs and shipping policies, and encouraged distributors to boycott Spray-Rite in furtherance of this conspiracy.

The district court instructed the jury that it should find Monsanto's conduct per se unlawful if it found that Monsanto engaged in the alleged conduct in furtherance of a conspiracy to fix resale prices. The court also gave the jury three special interrogatories.

> 1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?
>
> 2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created

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[2] Monsanto did not terminate the Spray-Rite distributorship; it simply refused to renew the distributorship when the 1967 contract expired. For purposes of our discussion, however, we will use "refused to renew" and "terminated" interchangeably. *See Yentsch* v. *Texaco, Inc.*, 630 F.2d 46 (2d Cir. 1980).

by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides?

3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?

The jury responded "yes" to each interrogatory and returned a general verdict against Monsanto awarding Spray-Rite $3,500,000 in damages.

No. 80-2232: Monsanto's appeal from the verdict.

Monsanto argues three separate grounds for reversal. First, it asserts that the jury charge contained material misstatements of the law governing the issues in this case. Second, Monsanto contends that there is insufficient evidence to support the verdict. Third, Monsanto argues that the district court made several erroneous evidentiary rulings. We find none of Monsanto's arguments persuasive, and, accordingly, we affirm the judgment of the district court.

I. The Jury Charge

We must consider alleged errors in jury instructions in light of the adequacy of the charge as a whole. *Alloy International Co.* v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222, 1226 (7th Cir. 1980). The district court instructed the jury generally concerning Spray-Rite's theory of the case. It also instructed the jury that Spray-Rite bore the burden of proof, including the burden of proving the existence of a conspiracy to fix the resale price of Monsanto herbicides. The instructions defined "conspiracy" and explained that some types of restraints are per se unlawful. The court then instructed the jury concerning termination of distributorships, boycotts, and the use of vertical restrictions. After carefully reviewing the entire jury charge, we are convinced that the instructions in this case were proper.

A. *Termination of the Spray-Rite Distributorship*

The court instructed the jury that a manufacturer has the

right to select its distributors and set a suggested resale price for its products. The instructions explained that this right is limited, however, because the manufacturer may not coerce distributors to follow its suggested price by threatening to terminate their distributorships. The court then instructed the jury that "[i]f the manufacturer's selection [of a distributor] is accompanied by unlawful *purpose,* conduct *or* agreement, it violates the Sherman Act." Tr. at 4363 (emphasis added). Monsanto contends that these instructions gave the jury the incorrect impression that a manufacturer that unilaterally decides to terminate a distributor violates the Sherman Act if the manufacturer had an improper motive.

A manufacturer may unilaterally fix a suggested resale price for its product. *United States* v. *Colgate,* 250 U.S. 300 (1919). It may also lawfully refuse to deal with any distributor that resells the product at a price other than that it has suggested. *Id.* If, however, the manufacturer does anything more than merely announce the suggested resale price and then refuse to deal with distributors that fail to comply with that price, the manufacturer is engaged in a per se unlawful resale price maintenance scheme. *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960); *United States* v. *Bausch & Lomb Co.,* 321 U.S. 707 (1944); *FTC* v. *Beech-Nut Co.,* 257 U.S. 441 (1922). An unlawful resale price maintenance scheme can be effected in either of two ways: the manufacturer and its distributors may enter into an express or implied agreement to maintain a fixed resale price, *United States* v. *Bausch & Lomb Co.,* 321 U.S. 707, 721 (1944), or the manufacturer may secure adherence to its suggested resale price through coercion, including threats to terminate distributors if they do not follow the suggested price. *United States* v. *Parke, Davis & Co.,* 362 U.S. 29, 43 (1960). The manufacturer may not terminate a distributor if (1) the termination is at the request of a competing distributor *and* (2) the termination is motivated by a desire to reduce or eliminate price competition for the manufacturer's products. *Contractor Utility Sales Co., Inc.* v. *Certain-Teed Products Corp.,* 638 F.2d 1061, 1072 & n.9 (7th Cir.

1981); *Alloy International Co.* v. *Hoover-NSK Bearing Co., Inc.*, 635 F.2d 1222, 1225-26 (7th Cir. 1980). *See also Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 992 (8th Cir. 1982); *Cernuto, Inc.* v. *United Cabinet Corp.*, 595 F.2d 164, 169-70 (3d Cir. 1979).

We agree with Monsanto that the jury should not have been instructed that a manufacturer's unilateral decision to terminate a distributor is unlawful if based on an improper motive. A manufacturer's unilateral termination of a distributor is not unlawful regardless of whether it is motivated by an illegal purpose. *United States* v. *Colgate*, 250 U.S. 300 (1919). We believe, however, that this one inaccuracy was harmless. The entire jury charge informed the jury that Spray-Rite had to prove the existence of an agreement, conspiracy, or combination and that Monsanto's termination of Spray-Rite was unlawful only if the decision to terminate was not unilateral.[3] The entire charge correctly instructed

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[3]The court gave the following instructions concerning Spray-Rite's claim that Monsanto unlawfully terminated the Spray-Rite distributorship:

> The fact that distributors complain about prices or anything else does not in itself mean that a conspiracy existed. Even if you find that Monsanto acted in exactly the way that complainants would have wished, that does not prove the existence of a conspiracy; it would, however, be evidence that you can take into consideration in deciding whether or not a conspiracy existed.
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> * * * *
>
> It is also unlawful for a manufacturer to terminate or threaten to terminate one of its distributors for the reason that the distributor objected to, or departed from either the manufacturer's price-fixing or stabilization plan or any customer or territorial restraints which are part of that plan. Therefore, if you find that termination or threat of termination was utilized by the defendant as a coercive tool against the plaintiff or any other distributor of defendant to force adherence to any aspect of a resale price maintenance plan, such termination or threat of termination is unlawful. It does not matter whether the defendant ini-

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the jury that Spray-Rite had to adduce evidence of an illegal purpose *and* an unlawful combination, conspiracy, or agree-

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tiated the coercion, or whether it was done in response to pressure or complaints from one or more of its distributors.

A termination or threat of termination to compel adherence to any aspect of a resale price maintenance plan is unlawful, whether or not there was any reasonable justification.

* * * *

The law recognizes a limited right in the manufacturer to select its distributors, but that right is neither absolute nor exempt from regulation. If the manufacturer's selection is accompanied by unlawful purpose, conduct or agreement, it violates the Sherman Act.

A manufacturer may announce suggested resale prices and refuse to sell to a distributor which refuses to abide by those suggested prices. However, the manufacturer's conduct must be totally independent. In deciding whether the manufacturer's conduct was completely independent and unilateral, you should look to what the participants did, rather than the words they used.

Therefore, the defendant's limited right to choose its distributors does not include the right to, in any way, conspire or combine with one or more of its distributors to fix or stabilize resale prices, or to refuse to deal, or to commit any other act which has been described in these instructions as a per se violation of the antitrust laws.

* * * *

The defendant has a right to select distributors that it thinks will do the best job for it provided that in doing so the defendant's decision not to renew the plaintiff's contract was not made pursuant to a price-fixing conspiracy or combination.

Tr. at 4354, 4356-57, 4363, 4364.

ment to prove that Monsanto's refusal to renew the Spray-Rite distributorship was unlawful.[4]

B. *Post-Termination Boycott of Spray-Rite*

Monsanto contends that the court's boycott instructions were erroneous. The court instructed the jury that a group boycott is per se unlawful and that it should find that Monsanto violated section 1 of the Sherman Act if it found that Monsanto agreed with some of its distributors to terminate Spray-Rite's distributorship or limit Spray-Rite's access to Monsanto products. Monsanto argues that only horizontal combinations to boycott are subject to the per se rule and that vertically imposed boycotts are subject to rule of reason analysis. Monsanto contends that the per se instruction should not have been given because Spray-Rite only introduced evidence of a *vertical* agreement between Monsanto and its distributors.

Certain types of group boycotts are among the practices that the Supreme Court has deemed to be per se unlawful. *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959);

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[4] Monsanto further claims that the instructions were incomplete because the district court refused to give an instruction Monsanto tendered. The court did not err in refusing to give Monsanto's tendered instruction because the instruction is erroneous. Monsanto requested that the court instruct the jury that:

> As long as its decision not to renew plaintiff's distributorship was not made pursuant to a conspiracy or combination to fix prices, defendant even had the right to agree with other distributors not to renew plaintiff's contract.

Tr. at 4206. Monsanto, however, could not lawfully terminate Spray-Rite's distributorship pursuant to an agreement with its distributors because such conduct is a concerted refusal to deal which is per se unlawful even if not part of a scheme to fix resale prices. *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531 (1978); *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

Fashion Originators' Guild v. *FTC,* 312 U.S. 457 (1941). Not all boycotts, however, are per se unlawful. *United States Trotting Ass'n* v. *Chicago Downs Ass'n, Inc.,* 665 F.2d 781 (7th Cir. 1981); *Smith* v. *Pro Football, Inc.,* 593 F.2d 1173 (D.C. Cir. 1978); *Hatley* v. *American Quarter Horse Ass'n,* 552 F.2d 646 (5th Cir. 1977); *Mackey* v. *NFL,* 543 F.2d 606 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); *Deesen* v. *Professional Golfers' Ass'n,* 358 F.2d 165 (9th Cir.), *cert. denied,* 385 U.S. 846 (1966), *reh. denied,* 385 U.S. 1032 (1967). A per se unlawful boycott has two essential elements: (1) at least some of the boycotters are competitors of each other and the target and (2) the boycott is designed to protect the boycotters from competition with the target. *United States Trotting Ass'n* v. *Chicago Downs Ass'n, Inc.,* 665 F.2d 781, 788 (7th Cir. 1981).

Spray-Rite claims that Monsanto and some of its distributors agreed to boycott it. This is precisely the type of group boycott that the Supreme Court held per se unlawful in *Flor's, Inc.* v. *Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959), and *United States* v. *General Motors Corp.,* 384 U.S. 127 (1966). In *Klor's,* a manufacturer and several retail stores agreed to boycott a retail store that competed with some of the boycotters. In *General Motors Corp.,* General Motors agreed with some of its dealers to boycott other dealers selling GM automobiles at reduced prices. In this case, according to Spray-Rite, Monsanto, like General Motors, agreed with some of its distributors to boycott Spray-Rite, a competing distributor. Spray-Rite's theory, if supported by the evidence, presents a "classic" group boycott in which there is "'a concerted attempt by a group of competitors at one level to protect itself from competition from non-group members who seek to compete at that level.'" *United States Trotting Ass'n* v. *Chicago Downs Ass'n, Inc.,* 665 F.2d 781, 788 (7th Cir. 1981), *quoting Smith* v. *Pro Football, Inc.,* 593 F.2d 1173, 1178 (D.C. Cir. 1978). The district court did not err in giving a per se boycott instruction.

The district court instructed the jury that it could consider Monsanto's compensation programs as evidence of Monsanto's conspiracy to boycott Spray-Rite.[5] Monsanto claims that this instruction is erroneous because it suggests that the jury could find a conspiracy to boycott Spray-Rite if it found (1) that Monsanto's territorial policies and compensation programs had an adverse effect on Spray-Rite and (2) that other distributors participated in the programs.

Monsanto has taken this instruction out of the context of the entire jury charge. The court instructed the jury that it could find a conspiracy only if it found that Monsanto and some of its distributors agreed to boycott Spray-Rite. The jury was instructed that "[m]ere similarity of conduct among various persons . . . does not necessarily establish proof of the existence of a conspiracy." Tr. at 4351. The entire jury charge properly instructed the jury concerning the elements of a conspiracy to boycott. The court did not err in instructing the jury that it could consider the effect of Monsanto's compensation programs as circumstantial evidence of the conspiracy to boycott.

C. *Monsanto's Compensation Programs and Shipping Policies*

Finally, Monsanto contends that the instructions concerning Monsanto's compensation programs and shipping policies were erroneous. The court instructed the jury that it is per se unlawful for a manufacturer to utilize customer or territorial restrictions as part of a comprehensive price-fixing plan or boycott. Monsanto claims that the court should have instructed the jury to determine the lawfulness of its compen-

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[5] The instruction stated:

> The fact that some of Monsanto's policies may have affected the price paid by all non-contract sellers, including plaintiff, does not necessarily establish a conspiracy, but may be evidence which you can consider along with all the other evidence in the case in deciding whether a conspiracy existed.

Tr. at 4365.

sation programs and shipping policies pursuant to the rule of reason rather than the per se rule. Monsanto's reliance on *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), in support of its argument, however, is misplaced.

In *Continental T.V.*, the Supreme Court held that the rule of reason, rather than the per se rule, applies in cases involving nonprice vertical location restrictions. 433 U.S. at 41 n.9. The Court held that the interbrand competition stimulated by the restrictions may outweigh the negative effects the restrictions have on intrabrand competition. Nothing in the Court's opinion, however, implies that it intended to limit *United States* v. *Sealy*, 388 U.S. 350 (1967), in which it held that otherwise lawful vertical restrictions imposed as part of an unlawful scheme to fix prices are per se unlawful. In *Sealy*, the Government argued that Sealy's policy of restricting its licensees to a single manufacturing and resale area was part of a per se unlawful market allocation and price-fixing scheme. Sealy responded that the restriction was a mere incident to its lawful trademark licensing. The Court rejected Sealy's contention and held that the manufacturing and resale restrictions were unlawful because they were part of a per se unlawful price-fixing scheme. "The territorial restraints were a part of the unlawful price-fixing and policing .... [I]ts connection with the unlawful price-fixing is enough to require that it be condemned as an unlawful restraint." *Id.* at 356-57.

United States v. *Sealy* rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices. 433 U.S. at 41 n.9 & 51 n.18. Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of an unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the per se rule.

The instruction about which Monsanto complains is similar to an instruction we approved in *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 827 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979), *later appeal*, 669 F.2d 490 (7th Cir. 1982).

Sealy's licensing agreement included a right-of-first-refusal clause granting Sealy the right to buy a franchise if it were put on the market and a clause requiring licensees to pay special charges to Sealy for any sales made outside a licensee's area of primary responsibility. Ohio-Sealy conceded that these contract terms were lawful in themselves but claimed that they were part of an illegal horizontal scheme to allocate markets and, thus, were per se illegal. The jury was so instructed, and we affirmed. *Accord, Mishawaka, Indiana* v. *American Electric Power Co., Inc.*, 616 F.2d 976, 986 (7th Cir. 1980), *cert. denied*, 449 U.S. 1096, *reh. denied*, 450 U.S. 960 (1981). In this case, the court instructed the jury that Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful if undertaken as part of an illegal scheme to fix prices. We find, as we did in *Ohio-Sealy*, that this instruction is accurate. "In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly restrained." *White Motor Co.* v. *United States*, 372 U.S. 253, 260 (1963) (citation omitted). *Accord, United States* v. *General Motors Corp.*, 384 U.S. 127, 142 (1966).[6]

II. Sufficiency of the Evidence

Monsanto contends that the evidence is insufficient to support the verdict. Monsanto initially claims that Spray-Rite failed to prove that Monsanto terminated Spray-Rite's

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[6] Monsanto's reliance on *Cowley* v. *Braden Industries, Inc.*, 613 F.2d 751 (9th Cir.), *cert. denied*, 446 U.S. 965 (1980), *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147 (7th Cir. 1978), and *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019 (2d Cir. 1976), *cert denied*, 429 U.S. 1097 (1977), is misplaced. Both *Cowley* and *General Beverage* are inapposite because the plaintiffs in those cases failed to allege that the distributors' territorial restrictions were ancillary to per se unlawful price-fixing schemes. *FLM Collision Parts, Inc.* is inapplicable because the Ninth Circuit found that the plaintiff had failed to prove the existence of a price-fixing conspiracy. Therefore, the rule of reason rather than the per se rule applied in those cases, which involved non-price, vertical restraints.

distributorship as part of a conspiracy to fix resale prices or that Monsanto combined with its distributors to boycott Spray-Rite. Monsanto argues in the alternative that even if Spray-Rite proved liability, it failed to prove the nature and extent of any actual damages caused by Monsanto's unlawful business practices.

In reviewing the trial court, we must weigh conflicting evidence and inferences most favorably to the prevailing party. *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.,* 633 F.2d 477, 479 (7th Cir. 1980). If there is any substantial evidence in the record to support the jury's verdict, we must affirm the judgment. *Fontana Aviation, Inc.* v. *Beech Aircraft Corp.,* 432 F.2d 1080, 1084 (7th Cir. 1970), *cert. denied,* 401 U.S. 923 (1971).

A. *Termination of the Spray-Rite Distributorship*

Monsanto claims that Spray-Rite failed to prove that Monsanto terminated the Spray-Rite distributorship pursuant to a conspiracy to fix the resale price of Monsanto herbicides. Monsanto contends that Spray-Rite had to prove either (1) that Monsanto agreed with Spray-Rite's competitors to terminate Spray-Rite in order to fix the resale price of Monsanto herbicides, *Contractor Utility Sales Co., Inc.* v. *Certain-Teed Products Corp.,* 638 F.2d 1061 (7th Cir. 1981), or (2) that Monsanto fixed resale prices of its herbicides by coercing distributors to adhere to its suggested prices. *United States* v. *Parke, Davis & Co.,* 362 U.S. 29 (1960). Monsanto contends that Spray-Rite failed to sustain its burden of proof on either of these two theories. First, Monsanto claims that Spray-Rite failed to prove the existence of an agreement between Monsanto and some of its distributors to terminate Spray-Rite. Spray-Rite was only able to show that Monsanto was concerned about the resale price of its herbicides and that it received some price complaints about Spray-Rite from other distributors. Moreover, Monsanto argues that it proved that it had valid business reasons for terminating Spray-Rite. Second, Monsanto contends that Spray-Rite failed to prove that Monsanto fixed the resale price of its herbicides by

coercing distributors to adhere to Monsanto's suggested resale prices. Monsanto argues that the evidence showed that Monsanto's distributors failed to adhere to the suggested prices and, consequently, there was extensive intrabrand price competition.

Monsanto argues that evidence of price complaints coupled with evidence of termination in response to those complaints is insufficient to prove the existence of a resale price maintenance agreement. It relies on *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 110 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), in which the Third Circuit held that proof of competitor complaints followed by termination is insufficient to create an inference of concerted action.

We believe, however, that proof of termination following competitor complaints is sufficient to support an inference of concerted action. In *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), the Eighth Circuit declined to follow *Sweeney* and held "that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints would be sufficient to raise an inference of concerted action." *Id.* at 991 (emphasis in original).[7] We agree. Proof of distributorship termination in response to competing distributors' com-

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[7] Monsanto relies on *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168 (8th Cir. 1982), as an indication that the Eighth Circuit has not rejected the *Sweeney* rule. In *Roesch,* the court affirmed the district court order directing a verdict against the plaintiff who claimed that Star Cooler Corporation conspired with two of its distributors to terminate Roesch's distributorship because Roesch was a price-cutter. The sole evidence of the alleged conspiracy was proof of price complaints and proof of termination. The Eighth Circuit held "that mere complaints by customers of a manufacturer that distributors and dealers engage in price-cutting are not enough to imply a conspiracy in violation of section 1." *Id.* at 1172.

The Eighth Circuit decided both *Roesch* and *Battle* on March 4, 1982. Neither opinion cited or discussed the other. To the

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plaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action. *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742 at 743 (7th Cir. 1982). *See also Alloy International Co.* v. *Hoover-NSK Bearing Co.*, 635 F.2d 1222 (7th Cir. 1980) (a terminated distributor presents sufficient evidence to support a verdict in its favor by proving (1) that the manufacturer received price complaints from the distributor's competitors, (2) that the manufacturer was concerned about raising its wholesale price and recognized that its ability to do so might be influenced by the distributor's prices, and (3) that the manufacturer terminated the distributorship).

Spray-Rite satisfied this burden of proof. Thomas Dille, a former Monsanto District Manager for Spray-Rite's area of primary responsibility, testified that he received numerous complaints about Spray-Rite's price-cutting practices. He further testified that some distributors requested that Monsanto terminate Spray-Rite's supply of Monsanto herbicides. James Hopkins, president of Hopkins Agricultural Chemical Company, a Monsanto distributorship in competition with Spray-Rite, testified that he complained to Monsanto about Spray-Rite's prices. Emmett McCormick, a former Monsanto Area Supervisor, testified that Monsanto was concerned about stabilizing the resale price of its herbicides and that Monsanto considered Spray-Rite a price-cutter. Yapp, president of Spray-Rite, testified that various Monsanto District Managers in 1966, 1967, and 1968 threatened to terminate his distributorship if he did not raise his prices. Finally, Monsanto did terminate Spray-Rite in 1968.

Monsanto claims that it terminated Spray-Rite because Spray-Rite was not satisfying Monsanto's announced distributorship criteria. William Bone, a Monsanto District Sales Manager, testified that Spray-Rite lacked technically

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extent that the holdings in these two cases conflict, we follow *Battle*.

trained employees capable of promoting Monsanto products. Bone admitted, however, that he never discussed the distributorship criteria with Yapp and that neither he nor anyone else from Monsanto informed Yapp in 1968 that Spray-Rite was failing to meet Monsanto's criteria. Moreover, Allen Davis, a Monsanto Manager of Marketing Administration, testified that Spray-Rite was the tenth largest purchaser of Monsanto products in 1968. Davis further testified that Monsanto gave Spray-Rite no written reasons for termination. Yapp testified that Donald Fischer, a Monsanto District Manager, told him that Monsanto terminated Spray-Rite because of price complaints about Spray-Rite. Although the evidence concerning Monsanto's reasons for terminating Spray-Rite was conflicting, the jury was not required to accept Monsanto's version of the case.[8] There was sufficient evidence to support the jury's verdict that Monsanto terminated Spray-Rite pursuant to a conspiracy with other distributors to fix the resale price of Monsanto herbicides.[9]

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[8] Monsanto's reliance on *H. L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), is misplaced. Eli Lilly told H.L. Moore that its distributorship would be terminated unless Moore complied with Lilly's long-standing rule prohibiting wholesalers from owning retail pharmacies. The only evidence of a conspiracy to fix resale prices was evidence of a price complaint from one distributor. The plaintiff simply failed to adduce sufficient evidence of a conspiracy to terminate its distributorship. In this case, however, we have evidence of many complaints coupled with evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite.

[9] Because we hold that Spray-Rite presented sufficient evidence to support the jury's verdict on its theory that Monsanto terminated the Spray-Rite distributorship pursuant to a resale price maintenance agreement between Monsanto and some of its distributors, we need not decide whether Spray-Rite presented sufficient evidence to support a verdict based on the theory that Monsanto effectuated its resale price maintenance scheme by coercing distributors into adhering to Monsanto's suggested resale price.

B. *Post-Termination Boycott of Spray-Rite*

Monsanto argues that Spray-Rite failed to adduce sufficient evidence to support the jury's finding that Monsanto combined with some of its distributors to boycott Spray-Rite because the evidence showed that Spray-Rite was able to purchase some Monsanto herbicides from Monsanto distributors after it was terminated. We disagree.

Yapp testified that he contacted several distributors after Spray-Rite was terminated, and they refused to sell Monsanto herbicides to Spray-Rite. John Mulvehill of Mid-State Chemical Company testified that he refused to deal with Spray-Rite because Stewart Daniels and Max Albertson of Monsanto threatened to terminate Mid-State's distributorship if it sold to Spray-Rite. Moreover, Emmett McCormick of Monsanto testified that Monsanto attempted to prevent Spray-Rite from obtaining Monsanto herbicides after termination. He also testified that he told Fred Bailey of Associated Producers not to sell to Spray-Rite. This evidence is sufficient to support the jury's finding that Monsanto and some of its distributors engaged in an unlawful group boycott of Spray-Rite. *E.g., United States* v. *General Motors Corp.*, 384 U.S. 127 (1966).[10]

C. *Proof of the Amount of Damage*

Finally, Monsanto claims that Spray-Rite's evidence of the damage suffered is insufficient to support the untrebled jury verdict of $3,500,000. Dr. Urban Ozanne, Professor of Marketing and Chairman of the Marketing Department,

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[10] Monsanto's reliance on *McClure* v. *Undersea Industries, Inc.*, 671 F.2d 1287 (11th Cir. 1982), is misplaced. McClure claimed that several of Undersea Industries' other distributors boycotted McClure after Undersea terminated McClure's distributorship. The Eleventh Circuit reversed the judgment in favor of McClure on the sole ground that McClure failed to prove any damages caused by the boycott. *Id.* at 1291. The court, however, never reached the issue of whether McClure presented sufficient proof of a conspiracy to boycott. *McClure*, thus, is inapposite.

College of Business, Florida State University, presented the only testimony concerning the amount of damage caused by Monsanto's unlawful practices. Dr. Ozanne testified that Monsanto's termination of Spray-Rite, the post-termination boycott, Monsanto's post-termination compensation programs, delivery policies and territorial restrictions forced Spray-Rite out of business in 1972. He further testified that Spray-Rite's sales decreased between 1968 and 1972 because of Spray-Rite's inability to obtain a sufficient quantity of Monsanto products. He calculated that Spray-Rite lost profits of $3,327,588 between 1968 and 1978. Dr. Ozanne's $3,327,588 calculation included losses incurred between 1968 and 1972 when Spray-Rite's sales were declining and losses incurred between 1972 and 1978 when Spray-Rite was out of business.

Dr. Ozanne did not attempt to account separately for the amount of damage caused by each of the Monsanto business practices he considered. He admitted that relying on his testimony, the jury would be unable to determine the amount of damage caused by each practice. He contended that "it would be very difficult" to compute the amount of damage caused by each practice "because these things merge together and interact among themselves—very difficult. You would have to make tremendous assumptions." Tr. at 2897. He did testify, however, that Monsanto's challenged business practices were the sole causes of all of Spray-Rite's damages.

In calculating the amount of damages, Dr. Ozanne used a regression analysis based on Spray-Rite's past performance, projected future performance, and industry trends. He testified that he used statistics, economics, econometrics, and cost accounting in reaching his conclusions, but admitted that he is not an expert in any of these fields. He also testified that he used a computer to check his calculations, but admitted that he is not a computer expert and that he did not write the computer programs that he used.

1. *Admissibility of Dr. Ozanne's Testimony*

Monsanto claims that because Dr. Ozanne admitted he was not an expert in all the fields of study on which he relied in preparing his damage testimony, the district court erred in permitting him to testify as an expert.

An expert must be "qualified as an expert by knowledge, skill, experience, training, or education." Rule 702, Fed. R. Evid. The district court is vested with broad discretion to determine whether a proffered expert is qualified to testify. We will reverse the court's ruling on the admissibility of expert testimony only upon a clear showing of abuse of discretion. *United States* v. *West*, 670 F.2d 675 (7th Cir. 1982); *United States* v. *Dellinger*, 472 F.2d 340 (7th Cir. 1972), *cert. denied*, 410 U.S. 970 (1973). Monsanto has failed to make such a showing.

Dr. Ozanne is qualified as an expert. He is a recognized marketing expert. *Greene* v. *General Foods Corp.*, 517 F.2d 635, 660 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). He testified that he obtained his doctorate in business administration from Indiana University in 1967; his major was marketing and his minors were economics, management, and international business. He has published articles concerning procedures for computing business damages. He has consulted concerning forecasting sales, expenses, and profits, and he has testified about these subjects in other cases. Although Dr. Ozanne is not an expert in computers, regression analysis, statistics, economics, econometrics, or cost accounting, he is trained to use these methods. Moreover, he testified that marketing analysts "constantly" use these methods. Tr. at 3005-07. The fact that Dr. Ozanne is not an expert in all the fields of studies on which marketing analysts regularly rely "does not make him obviously unqualified in light of his other credentials and experience." *California Steel & Tube* v. *Kaiser Steel Corp.*, 650 F.2d 1001, 1003 (9th Cir. 1981).

Monsanto claims that the district court erred in admitting Dr. Ozanne's testimony because his opinion was not based on facts as required by rule 703 of the Federal Rules of Evidence. Dr. Ozanne testified that Spray-Rite's damages were caused by Monsanto's conspiracy to fix the resale price of Monsanto products and to boycott Spray-Rite. He testified that the conspiracy was the "only event of substance" that affected Spray-Rite's business after 1968. He admitted, however, that any other events of substance necessarily would have affected the accuracy of his damages projection if they had occurred. Monsanto claims that the evidence at trial indicated that other events of substance did occur after 1968, including an industry increase in interbrand and intrabrand competition. Monsanto argues that Dr. Ozanne's damage opinion is not based on facts because he failed to consider the effect of these other events of substance, and, thus, his testimony should have been excluded. Moreover, Monsanto argues that Dr. Ozanne's testimony should have been excluded because he improperly included in his damages calculation Spray-Rite's post-1972 loss of customers who never purchased Monsanto products.

Several herbicide distributors, including Donald Yapp, testified that a distributor needed to carry all brands of herbicides because dealers and farmers wanted to buy all their herbicides from one seller. Monsanto, of course, disagrees. Nevertheless, this was a fact in evidence upon which Dr. Ozanne could properly base his damage calculation. Similarly, Dr. Ozanne could properly conclude that no other events of substance occurred and rely on the causes of damage he cited. Dr. Ozanne's failure to consider the effect of factors Monsanto argued he should have considered reflects on his credibility, but it does not make his testimony inadmissible.

Finally, Monsanto argues that the district court should have excluded Dr. Ozanne's testimony because Spray-Rite cannot recover damages for the destruction of its entire business. Monsanto relies on *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.*,

633 F.2d 477 (7th Cir. 1980), in which we noted that "[t]he favored method of ascertaining damage in antitrust litigation is to consider only that product line or market in which the plaintiff suffered injury rather than plaintiff's entire business." *Id.* at 483 (citations omitted). In *Trabert & Hoeffer,* however, the plaintiff's entire business was not destroyed by the defendant's unlawful termination of Trabert & Hoeffer's Piaget distributorship. If the defendant's unlawful conduct causes the plaintiff to go out of business, the plaintiff is entitled to recover the full amount of that loss. *Shor-line Rambler, Inc.* v. *American Motors Sales Corp.,* 543 F.2d 601 (7th Cir. 1976).[11]

2. *Disaggregation of Damage Sum*

Monsanto claims that the evidence is insufficient to support the $3,500,000 verdict because Spray-Rite failed to prove how much damage was caused by each of the challenged Monsanto practices. Monsanto claims that an antitrust plaintiff bears the burden of disaggragating its damage sum and proving the amount of damage attributable to each of the defendant's challenged business practices.

The plaintiff bears the burden of proving the amount of damage suffered as a result of the defendant's unlawful conduct. *Story Parchment Co.* v. *Paterson Parchment Paper Co.,* 282 U.S. 555, 561-66 (1931). There are, however, practicable limits to the scope of this burden. *Zenith Radio Corp.* v. *Hazeltine Research,* 395 U.S. 100, 123-24 (1969). Because a plaintiff can seldom prove the exact amount of antitrust damages, he may sustain his burden with circumstantial

[11] Monsanto also argues that Dr. Ozanne's opinion testimony should have been excluded because he included damages caused by Monsanto's compensation and shipping policies which Monsanto claims were lawful practices. There was sufficient evidence to support Dr. Ozanne's and the jury's conclusion that these policies were in fact part of Monsanto's unlawful conspiracy. *See* discussion section I.,C. *supra.*

evidence and estimates of damage based on reasonable assumptions. *Locklin* v. *Day-Glo Color Corp.,* 429 F.2d 873, 879 (7th Cir. 1970), *cert. denied,* 400 U.S. 1020 (1971).

> Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

Bigelow v. *RKO Radio Pictures, Inc.,* 327 U.S. 251, 264-65 (1946).

Dr. Ozanne testified that three factors combined to cause Spray-Rite's damages: (1) Monsanto's termination of the Spray-Rite distributorship; (2) Monsanto's post-termination marketing programs, including the compensation and technical programs, and (3) Monsanto's post-termination marketing policies, including Monsanto's assigned areas of primary responsibility and delivery policies. He testified that it would be "very difficult" to apportion the amount of damage caused by each of these factors "because these things merge together and interact among themselves." Tr. at 2897. Monsanto did not present any evidence refuting Dr. Ozanne's conclusions.

A plaintiff claiming injury caused by more than one of the defendant's unlawful practices need not prove the amount of damage caused by each illegal practice if the plaintiff shows that disaggregation is impracticable. If the plaintiff shows that such proof is impracticable, the burden shifts to the defendant to demonstrate the contrary. *Greene* v. *General Foods Corp.,* 517 F.2d 635, 665 (5th Cir. 1975), *cert. denied,* 424 U.S. 942 (1976); *ILC Peripherals Leasing Corp.* v. *IBM Corp.,* 458 F. Supp. 423, 434 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp.* v. *IBM Corp.,* 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied,* 452 U.S. 972 (1981). Any other rule would permit the defendant to escape compensating the plaintiff if the

defendant's wrongful conduct were sufficiently varied and effective to render more exact proof of damage impossible. "[A] defendant whose wrongful conduct has rendered difficult the ascertainment of precise damages suffered by the plaintiff is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible." *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.*, 633 F.2d 477, 484 (7th Cir. 1980). Spray-Rite sustained its burden by proving that disaggregation was impracticable; Monsanto failed to rebut Spray-Rite's evidence by showing that disaggregation was indeed possible.

Monsanto argues that we ought to reverse the jury verdict because the second interrogatory indicates that the jury may not have found that the illegal conspiracy included Monsanto's compensation programs *and* its areas of primary responsibility *and* its shipping policy.[12] Assuming that the jury did not find all three practices part of the conspiracy, Monsanto alleges that the jury verdict awarding the total aggregated damage amount requires Monsanto to compensate Spray-Rite for lost profits caused by Monsanto's lawful competition.

The only damage evidence introduced at trial established that it was impracticable to disaggregate the damage sum and apportion the amount of damage caused by each of Monsanto's business practices. Because the jury responded "yes" to the second interrogatory, it found at least one of the

[12] The second interrogatory, to which the jury responded "yes", asked:

> Were the compensation programs *and/or* areas of primary responsibility, *and/or* shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

Monsanto requested that the interrogatory be phrased in the conjunctive, but the court inserted the "or" at Spray-Rite's request.

named practices—the compensation programs, the areas of primary responsibility, or the shipping policy—part of the unlawful resale price maintenance scheme. Clearly, Spray-Rite is entitled to recover the lost profits caused by Monsanto's anti-competitive business practices. We will not deprive Spray-Rite of this recovery merely because the jury may have found that Monsanto combined lawful conduct with unlawful conduct making it impossible to determine which portion of the total damages was caused by the unlawful conduct. *Trabert & Hoeffer, Inc.* v. *Piaget Watch Corp.*, 633 F.2d at 484.[13]

Finally, Monsanto argues that the jury verdict must be reversed because it is excessive. The only evidence at trial concerning the amount of damage was Dr. Ozanne's testimony that Spray-Rite suffered $3,327,588 damage. The jury awarded Spray-Rite $3,500,000. We agree with Monsanto that $172,412 of the verdict is excessive. *Alover Distributors, Inc.* v. *Kroger Co.*, 513 F.2d 1137, 1141-42 (7th Cir. 1975). Reversal is unnecessary, however, if Spray-Rite will accept a remittitur of $172,412. If Spray-Rite will consent to the remittitur, the judgment shall be reduced to $3,327,588 and this reduced judgment will be affirmed. If Spray-Rite refuses to accept the remittitur, the judgment will be

[13] *ILC Peripherals Leasing Corp.*, v. *IBM Corp.*, 458 F. Supp. 423 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp.* v. *IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981), on which Monsanto relies, is not to the contrary. ILC Peripherals claimed that several of the defendant's business practices were unlawful restraints of trade and that these practices caused it to suffer total damages of $306,580,000. The district court directed a verdict in defendant's favor on the ground that plaintiff had failed to prove its damages with sufficient specificity. In *ILC Peripherals Leasing Corp.*, however, there was evidence that disaggregation was possible. Where it is possible to apportion the amount of damages caused by the unlawful conduct alone, the defendant cannot be held liable for the plaintiff's losses attributable to lawful competition.

reversed and the case remanded for a new trial on the question of the amount of damages. *Id.*

III. Evidentiary Challenges

Monsanto claims that the district court made several erroneous evidentiary rulings. Monsanto claims that the court erred (1) in failing to exclude speculative testimony, (2) in admitting hearsay statements attributed to distributors that were not shown to be coconspirators, (3) in excluding Monsanto's rebuttal witness, and (4) in permitting Spray-Rite to make a "Golden-Rule" appeal during closing argument.

We will reverse a jury verdict because of an erroneous evidentiary ruling only upon a clear showing that the error affected "a substantial right of the party." Rule 103, Fed. R. Evid. If the error was harmless, the jury verdict must be affirmed. Rule 61, Fed. R. Civ. P. After careful review of the record, we are convinced that any errors that occurred were harmless.

A. *Speculative Testimony*

A witness may not testify to a matter unless he has personal knowledge of that matter. Rule 602, Fed. R. Evid. Monsanto contends that the district court erred in permitting Michael Flynn, a former Monsanto field salesman, and David Stein, a Monsanto District Sales Manager, to testify concerning Monsanto's reasons for refusing to renew Spray-Rite's distributorship. It is clear from Flynn's and Stein's testimony that they did not know why Monsanto terminated Spray-Rite. Although the court erred in admitting this speculative testimony, the error was harmless. Both men's testimony indicated that they were stating their respective opinions as to why Spray-Rite might not be their choice as a distributor. The jury could not have understood their testimony to be anything other than an opinion. Moreover, Flynn's response was consistent with Monsanto's defense

that it refused to renew the Spray-Rite distributorship because Spray-Rite was not meeting the distributorship criteria.[14] David Stein's testimony, on the other hand, was merely cumulative because his testimony corroborated that of other witnesses with personal knowledge.[15] "Where testimony is improperly admitted but 'was merely cumulative on matters which were clearly shown by other admissible evidence [then]. . . the admission of such testimony was harmless.'" *Hannigan* v. *Sears, Roebuck & Co.,* 410 F.2d 285, 292-93 (7th Cir.), *cert. denied,* 396 U.S. 902 (1969) (citations omitted).

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[14] The following exchange occurred during Flynn's direct examination:

> Q. My question is, did you have conversations with Monsanto representatives about these factors as contributing to Spray-Rite's non-renewal as a distributor?
>
> A. We weren't asked reasons as to why Spray-Rite was discontinued. As I said, this was done before my entry into the territory; and *hypothesizing with other salesmen* as to who we would want as distributors and who we were glad we didn't have as distributors, Don Yapp's name did come up. *And aside from not meeting the criteria, it was that price was a factor as to why people would not want him as a distributor.*

Tr. at 160 (emphasis added).

[15] Monsanto complains that the following colloquy should have been excluded:

> Q. . . . Do you know of any instances where instructions were given from the—or from anyone that these—that any terminated distributors were not to get Monsanto products?
>
> A. . . . I do know that the internal attitude towards Spray-Rite was vehement enough that *if there was instructions* given against anybody, *it could have been* against Spray-Rite because they did not like him at all.

Tr. at 2406 (emphasis added).

B. *Hearsay Testimony*

Yapp testified that two Monsanto distributors, Phil James of Mid West Agriculture and Leo Sterk of Laverty Sprayers, refused to sell Monsanto products to Spray-Rite after its distributorship was terminated. Yapp testified that James explained that Fred Lane of Monsanto had told him to restrict his sales to Mid West's area of primary responsibility. Yapp also testified that Sterk explained that Laverty could not sell Monsanto products to Spray-Rite at a lower price without risk of termination. Sterk testified that he could not recall giving that reason to Yapp as an explanation of why Laverty would not lower its price. Monsanto claims that Yapp's hearsay testimony should have been excluded because Spray-Rite failed to show by a preponderance of the evidence that Mid West and Laverty were part of the conspiracy to boycott Spray-Rite. *United States* v. *Santiago,* 582 F.2d 1128 (7th Cir. 1978).

Independent, non-hearsay evidence linked Mid West to the conspiracy. Spray-Rite introduced a memorandum dated November 16, 1970, in which Lane memorialized a conversion with James. The memorandum indicated that Lane reminded James to follow Monsanto's "sales policies." Other evidence indicated that Monsanto's "sales policies" included assigning areas of primary responsibility and encouraging sales in those areas. This evidence is sufficient to link Mid West with the conspiracy. The court did not err in admitting Yapp's hearsay testimony concerning his conversation with Phil James.

Because no evidence linked Laverty Sprayers to the conspiracy to boycott Spray-Rite, Yapp's hearsay testimony concerning his conversation with Leo Sterk should have been excluded. We find this error harmless, however, in light of Sterk's testimony that he could not recall telling Yapp that Laverty could not lower its price on Monsanto products for fear that its distributorship would be terminated. Moreover, there is sufficient independent evidence from which the jury

reasonably could have found that Monsanto and other distributors conspired to boycott Spray-Rite. We do not believe that this one improperly admitted hearsay statement affected Monsanto's substantial rights. Rule 103, Fed. R. Evid.

C. *Exclusion of Rebuttal Witness*

Monsanto claims that the district court erred in refusing to permit Nate McGuire to testify during rebuttal. McGuire was not listed as a defense witness on the final pretrial witness list, and Monsanto gave Spray-Rite only three days notice of its desire to call McGuire. The court ruled that the three day notice did not give Spray-Rite sufficient time to prepare to cross-examine McGuire. Moreover, Monsanto admitted that it could call another witness who had been listed on the pretrial list. The court ruled that permitting McGuire to testify under these circumstances would be manifestly unfair.

In ruling on a party's motion to call a witness not included on a pretrial witness list ordered pursuant to rule 16 of the Federal Rules of Civil Procedure, the district court should consider four factors:

> (1) the prejudice or surprise in fact of the party against whom the excluded witnesses would have testified;
>
> (2) the ability of that party to cure the prejudice;
>
> (3) the extent to which waiver of the rule against calling unlisted witnesses would disrupt the orderly and efficient trial of the case or of other cases in the court;
>
> (4) bad faith or willfulness in failing to comply with the court's order.

Meyers v. *Pennypack Woods Home Ownership Ass'n*, 559 F.2d 894, 904 (3d Cir. 1977), *quoted in De Marines* v. *KLM Royal Dutch Airlines*, 580 F.2d 1193, 1202 (3d Cir. 1978). The district court gave due consideration to these factors and concluded that permitting Monsanto to call McGuire would prejudice

Spray-Rite because Spray-Rite did not have adequate time to prepare for the witness. Any prejudice to Monsanto engendered by excluding McGuire's testimony could be cured by the testimony of the other available, listed witnesses. Under these circumstances, the district court did not abuse its discretion in excluding McGuire's testimony. *Franklin Music Co.* v. *ABC,* 616 F.2d 528 (3d Cir. 1979).

D. *"Golden Rule" Appeal*

Monsanto argues that Spray-Rite's appeal to sympathy in its closing argument requires reversal. Spray-Rite made the following appeal during its closing rebuttal argument:

> MR. JINKINSON: Ladies of the jury, I want to tell you that I'm not standing here before you with my hat in my hand asking you to give me something. I think this record shows that Spray-Rite and Don Yapp are entitled to substantial damages in this case. I only ask you in your consideration to take the position that if you traded seats with Don Yapp and he was in the box, I would ask him—
>
> MR. BARTLIT: I object to that as improper.
>
> MR. JINKINSON: —to give you the same consideration.—
>
> THE COURT: It is argument.
>
> MR. JINKINSON: —the same deliberation as you would if you were a plaintiff in this case, that's all we're asking. We want you to consider this thoroughly, impartially. We want you to—and I ask you to return a substantial verdict for my client, Spray-Rite Corporation.

Tr. at 4325-26.

A "Golden Rule" appeal in which the jury is asked to put itself in the plaintiff's position "is universally recognized as improper because it encourages the jury to depart from neutrality and to decide the case on the basis of personal interest

and bias rather than on the evidence." *Ivy* v. *Security Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978), *rev. on other grounds*, 606 F.2d 524 (5th Cir. 1979) (en banc), *cert. denied*, 446 U.S. 956, *reh. denied*, 448 U.S. 912, *on remand*, 89 F.R.D. 322 (N.D. Miss. 1980). *Accord, Shroyer* v. *Kaufman*, 426 F.2d 1032, 1033 (7th Cir. 1970). Spray-Rite's counsel should have refrained from asking the jury to put itself in Spray-Rite's position when it decided how much to award Spray-Rite. The remark was clearly improper, but we are not convinced that it was so prejudicial that it deprived Monsanto of a fair trial. The appeal to sympathy was not repeated. *Klotz* v. *Sears, Roebuck & Co.*, 267 F.2d 53, 55 (7th Cir.), *cert. denied*, 361 U.S. 877 (1959). Moreover, the jury was properly instructed concerning the law it should apply in determining liability and damages. We certainly do not condone Spray-Rite's argument, but we find that it was harmless error. *Shroyer* v. *Kaufman*, 426 F.2d 1032 (7th Cir. 1970).

No. 80-1621: Monsanto's appeal from the amended judgment.

Monsanto appeals from the district court's March 21, 1980 order granting Spray-Rite's motion to amend the judgment to assess costs and attorneys' fees against Monsanto. We affirm.

On February 21, 1980, the jury returned a verdict against Monsanto and awarded Spray-Rite \$3,500,000 damages. The jury responded "yes" to each of three special interrogatories. After dismissing the jury, the court rendered judgment on the verdict. The court announced "that judgment is hereby entered on the verdict in the sum of \$10,500,000.00." Later that day the court entered a more specific minute order stating, "Court enters judgment in favor of plaintiff on the jury's verdict. The Court trebles damages and assesses damages in the amount of \$10,500,000.00 plus interest at the legal rate *and costs*." (Emphasis added.)

Because the jury returned a general verdict accompanied by responses to special interrogatories, the Clerk of the District Court was not empowered to enter judgment until he received an approved verdict form from the court.[16] On February 22, 1980, the clerk entered judgment pursuant to the court's minute order. The clerk, however, mistranscribed the approved verdict form and deleted the court's reference to costs.[17]

On March 11, 1980, eighteen days after judgment was entered, Spray-Rite filed a motion to amend the judgment to

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[16] Rule 58, Fed. R. Civ. P., provides:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

[17] The judgment Order entered February 22, 1980, stated:

> This action came on trial before the court and a jury, Honorable Stanley J. Roszkowski, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict.
>
> It is Ordered and Adjudged that judgment is hereby entered against the defendant, Monsanto Company, and in favor of plaintiff, Spray-Rite Service Corporation, and assesses [sic] damages in the amount of $10,500,000.00 plus interest at the legal rate.

assess costs and attorneys' fees. Monsanto contested the motion on the ground that it was untimely. Monsanto argued in the district court, as it does on appeal, that Spray-Rite's motion was a rule 59(e), Federal Rules of Civil Procedure, motion to amend the judgment.[18] Monsanto argued that the court lacked jurisdiction to grant the motion because it was not filed within ten days after entry of judgment.

The district court rejected Monsanto's argument and granted Spray-Rite's motion on March 21, 1980. The district court ordered the clerk to amend the judgment pursuant to rule 60(a), Federal Rules of Civil Procedure.[19] On March 28, 1980, the clerk entered the amended judgment assessing damages of $10,500,000 plus interest at the legal rate and costs and attorneys' fees.

Rule 59(e) and rule 60(a) prescribe procedures for different types of post-judgment relief. A rule 59(e) motion, which must be filed within ten days after entry of judgment, seeks correction of an error of substantive law, *White* v. *New Hampshire Dept. of Employment Security*, ___ U.S. ___, ___, 102 S.Ct. 1162, 1166 (1982), whereas a rule 60(a) motion, which may be filed at any time, seeks correction of a clerical "error of transcription, copying, or calculation." *Bershad* v. *McDonough*, 469 F.2d 1333, 1336 (7th Cir. 1972).

To the extent that Spray-Rite's motion sought to amend the judgment to assess costs, the motion was governed by rule

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[18] Rule 59(e), Fed. R. Civ. P., provides:

> (e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment.

[19] Rule 60(a), Fed. R. Civ. P., provides, in pertinent part:

> (a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

60(a), not rule 59(e). The only relief sought was correction of the clerk's omission of the assessment of costs, which was included in the court's February 21, 1980 minute order. Because rule 60(a) contains no time limit, Spray-Rite's motion to amend the judgment to assess costs was timely, and the district court had jurisdiction to grant the relief it ordered.

We also believe that rule 59(e) does not govern Spray-Rite's motion to amend the judgment to assess attorneys' fees. The Supreme Court recently held that a post-judgment motion for attorneys' fees pursuant to 42 U.S.C. § 1988, which provides that a prevailing party in a civil rights suit shall recover "a reasonable attorney's fee as part of the costs," is not a rule 59(e) motion. *White* v. *New Hampshire Dept. of Employment Security,* ___ U.S. ___, 102 S.Ct. 1162 (1982). The court held that rule 59(e) only governs post-judgment motions seeking reconsideration of the decision on the merits. *Id.* at .... The court reasoned that "[b]y contrast, a request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *Id.*

Like 42 U.S.C. § 1988, section 4 of the Clayton Act, 15 U.S.C. § 15, provides that prevailing antitrust plaintiffs shall recover attorneys' fees as well as costs.[20] Because of the similarity of these two statutory provisions, we believe that

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[20] Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States or in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, ***and shall recover*** threefold the damages by him sustained, and ***the cost of suit, including*** reasonable attorney's fees.

(Emphasis added.)

the Supreme Court's reasoning in *White* applies in this instance. Spray-Rite's motion to amend the judgment to assess costs raised issues collateral to the merits of the antitrust cause of action "—issues to which rule 59(e) was never intended to apply." *White* v. *New Hampshire Dept. of Employment Security*, ___ U.S. at ___, 102 S.Ct. at 1166 (1982). *Accord*, *Bond* v. *Stanton*, 630 F.2d 1231 (7th Cir. 1980), *later appeal*, 655 F.2d 766 (7th Cir.), *cert. denied sub nom. Blinzinger* v. *Bond*, ___ U.S. ___, 102 S.Ct. 614 (1981).

In this Circuit, a motion to amend the judgment to assess attorneys' fees which raises issues collateral to the merits of the cause of action is governed by rule 54(d), Federal Rules of Civil Procedure,[21] which "imposes no time apart from an implicit requirement of reasonableness." *Hairline Creations, Inc.* v. *Kefalas*, 664 F.2d 652, 655 (7th Cir. 1981).[22] Spray-Rite's

[21] Rule 54(d), Fed. R. Civ. P., provides:

> (d) Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within 5 days thereafter, the action of the clerk may be reviewed by the court.

The Supreme Court in *White* declined to decide whether the motion to amend the judgment to assess attorneys' fees was governed by rules 54(d) and 58, Fed. R. Civ. P. *White* v. *New Hampshire Dept. of Employment Security*, ___ *U.S.* ___, ___, 50 U.S.L.W. 4255 (Mar. 2, 1982). Instead, the Court noted that district courts could adopt local rules "establishing timeliness standards for the filing of claims for attorney's fees." *Id.* at ___.

[22] In *Hairline Creations*, the plaintiff's motion to amend the judgment to assess attorneys' fees was based on 15 U.S.C. § 1117, which authorizes the court to award reasonable attorneys' fees to the prevailing party in a trademark violation case "in exceptional cases." We held that the plaintiff's motion was governed

(footnote continued on next page)

motion was filed within eighteen days after entry of judgment. Monsanto has not alleged that it was prejudiced in any way by this delay or that the delay was unreasonable. The district court, therefore, did not err in granting Spray-Rite's motion to amend the judgment.

No. 80-2233: Spray-Rite's cross-appeal from the unamended judgment.

Spray-Rite cross-appeals from the judgment entered February 22, 1980, to the extent that it failed to assess costs and attorneys' fees. The amended judgment entered March 28, 1980, superseded the judgment entered February 22, 1980, and awarded Spray-Rite the relief it seeks in this cross-appeal. Accordingly, we dismiss Spray-Rite's cross-appeal.

(footnote continued from preceding page)

by rule 59(e) because the decision whether to assess fees was not collateral to the merits of the underlying cause of action.

> The exercise of discretionary authority to award attorneys' fees is inextricably intertwined with the factual and legal issues that the trial court resolves at judgment. Second, the award of attorneys' fees is merely one of several potential remedies for trademark violations. . . . A motion for attorneys' fees would, therefore, require the trial court to reexamine the basis of the judgment to determine if the "exceptional" requirement had been met so as to justify the remedy. This characterization of § 1117 leads inescapably to the conclusion that a post-judgment motion for attorneys' fees is a motion to alter or amend the judgment.

Id. at 658. We distinguished § 1117 from 42 U.S.C. § 1988, the attorneys' fees provision at issue in *White* v. *New Hampshire Dept. of Employment Security*, ___ U.S. ___, 102 S.Ct. 1162 (1982), noting that attorneys' fees under § 1988 are in the nature of an equitable award which is governed by rule 54(d). Section 4 of the Clayton Act's award of attorneys' fees is more analogous to § 1988 than to § 1117 because both § 4 and § 1988 provide for recovery of attorneys' fees as of right if the plaintiff prevails. Section 1117, on the other hand, permits recovery of attorneys' fees only if the plaintiff prevails in an "exceptional" case.

No. 80-2624: Monsanto's appeal from the award of $895,747.80 in attorneys' fees.

Monsanto appeals from the October 17, 1980 district court order awarding Spray-Rite $895,747.80 in attorneys' fees.[23] Monsanto claims that the court erred in awarding fees (1) for time billed on issues for which no recovery was obtained, (2) for time billed on the question of fees, (3) for time billed for duplicative efforts, and (4) for time billed by paralegal assistants and law clerks. We agree that the district court erred in assessing attorneys' fees for time billed on issues for which Spray-Rite did not obtain recovery, and accordingly we affirm the judgment in part and reverse and remand in part.

The successful antitrust plaintiff is entitled to recover attorneys' fees as a matter of right. 15 U.S.C. § 15. The plaintiff bears the burden of establishing the amount of compensable attorney time reasonably devoted to prosecuting its cause of action. *Baughman* v. *Wilson Freight Forwarding Co.*, 583 F.2d 1208, 1216 (3d Cir. 1978). We will disturb the district court's decision regarding the amount of fees only upon a clear showing of abuse of discretion, *Prandini* v. *National Tea Co.*, 585 F.2d 47, 51 (3d Cir.), *on remand*, 80 F.R.D. 447 (W.D. Pa. 1978).[24] In exercising its discretion, the

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[23] Monsanto does not appeal from that portion of the October 17, 1980 order awarding Spray-Rite $16,875.79 in costs.

[24] The circuits that have addressed the issue all agree that a court of appeals may overturn a district court award of attorneys' fees to a successful antitrust plaintiff only upon a showing of abuse of discretion. *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 624 F.2d 575, 581 (5th Cir. 1980); *International Travel Arrangers, Inc.* v. *Western Airlines, Inc.*, 623 F.2d 1255, 1274 (8th Cir.), *cert. denied*, 449 U.S. 1063 (1980); *Merola* v. *Atlantic Richfield Co.*, 493 F.2d 292, 295 (3d Cir. 1974), *later appeal*, 515 F.2d 165 (3d Cir. 1975); *Alpine Pharmacy, Inc.* v. *Charles Pfizer & Co.*, 481 F.2d 1045, 1050, (2d Cir.), *cert. denied sub nom. Patlogan* v. *Dickstein, Shapiro & Galligan*, 414 U.S. 1092 (1973); *Elyria-Lorain Broadcasting Co.* v. *Lorain Journal Co.*, 358 F.2d 790, 794 (6th Cir. 1966); *Twentieth Century Fox Film Corp.* v. *Goldwyn*, 328 F.2d 190, 221 (9th Cir.), *cert. denied*, 379 U.S. 880 (1964).

district court should consider "the reasonableness of the time spent by counsel, the extent of counsel's success, and the complexity of the case." *Waters* v. *Wisconsin Steel Workers*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

Spray-Rite's petition for fees requested a lodestar amount of $895,747.80. The billing records Spray-Rite attached to the petition detailed the individuals who worked on the case, the period of time during which they each participated in the preparation of the case, the amount of time expended by each individual, the nature of the work performed, and the hourly billing rate for each individual. Monsanto objected to several of the items included in the request. Both parties filed memoranda with the court, and on October 17, 1980, the district court entered an order awarding Spray-Rite the total amount of attorneys' fees requested.

Monsanto claims that the district court abused its discretion by awarding Spray-Rite $63,370.25 for time billed by law clerks and paralegal assistants. Monsanto contends that paralegal fees may be recovered only to the extent that their billing is included as overhead in the lawyers' billing rates. We disagree.

Only two circuit courts of appeals have considered whether paralegal fees are recoverable under section 4 of the Clayton Act, 15 U.S.C. § 15. The Second Circuit reversed the district court award of paralegal fees holding that these fees "cannot be considered as input in the fee award determination." *Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 473 (2d Cir. 1974). The Ninth Circuit, however, affirmed the district court's award of paralegal fees. *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975), *cert denied*, 425 U.S. 959 (1976). The Ninth Circuit quoted with approval the following language from the district court's opinion:

> As a matter of practice, most attorneys engaged in the antitrust practice use such legal assistants, particularly

> in digesting and indexing discovery and trial materials, much of the work heretofore performed by relatively inexperienced lawyers . . . . As a matter of policy, the use of paralegal help in this fashion greatly reduces the cost of legal services to the public and thus is a practice to be encouraged.

Id. at 1210 n.19. We think the Ninth Circuit has adopted the better view and, accordingly, we hold that paralegal and law clerk fees are recoverable as a portion of the plaintiff's reasonable attorneys' fees. The court did not abuse its discretion in awarding Spray-Rite $63,370.25 in paralegal fees.

Monsanto also claims that the court erred in awarding attorneys' fees for time spent on the question of fees. Monsanto argues that Spray-Rite cannot recover for 73 hours spent on preparation of the fees petition or for 113.25 hours spent on amending the judgment to assess attorneys' fees. In support of its argument, Monsanto relies on *Locklin* v. *Day-Glo Color Corp.,* 378 F. Supp. 423, 429 (N.D. Ill. 1974), in which the district court held that "time devoted to compiling and presenting the bill is beyond the scope of effort for which fees are to be allowed." Other circuits, however, have rejected the *Locklin* court's view. *Prandini* v. *National Tea Co.,* 585 F.2d 47, 53 (3d Cir.), *on remand,* 80 F.R.D. 447 (W.D. Pa. 1978); *Perkins* v. *Standard Oil Co. of California,* 474 F.2d 549, 555 (9th Cir.), *cert. denied,* 412 U.S. 940 (1973). We likewise have held that time spent litigating the question of fees is compensable. *Bond* v. *Stanton,* 630 F.2d 1231, 1235 (7th Cir. 1980), *later appeal,* 655 F.2d 766 (7th Cir.), *cert. denied sub nom. Blinzinger* v. *Bond,* ___ U.S. ___ (1981) (fees pursuant to 42 U.S.C. § 1988). We think that this is the better view.

> To the extent that courts prescribe procedures which must be exhausted before a successful plaintiff may obtain the fruit of his invocation of the judicial process, the expense of complying with such procedures is just as much a condition precedent to a litigant's obtaining the relief to which he is entitled as the outlay for court costs which litigants . . . must fork out before indulging in the

> privilege of seeking justice at the hands of a judicial tribunal. We therefore conclude that the time devoted by plaintiff's attorneys in prosecuting the fee and application should not be excluded.

Pitchford Scientific Instruments Corp. v. *Pepi, Inc.,* 440 F. Supp. 1175, 1179-80 (W.D. Pa. 1977), *aff'd without opinion,* 582 F.2d 1275 (3d Cir. 1978), *cert. denied,* 440 U.S. 981 (1979). The district court did not abuse its discretion in awarding Spray-Rite attorneys' fees for time spent on the issue of fees.

Monsanto further claims that the court erred in awarding Spray-Rite attorneys' fees for duplicative efforts. Monsanto contends that Spray-Rite's attorneys billed so many hours that there must have been a substantial duplication of efforts.

Spray-Rite's fee petition included a total of 13,400 hours billed. The trial of this case consumed six weeks. In view of the length of the trial and the concomitant time necessary for adequate preparation of the case, we find that the district court did not err in rejecting Monsanto's assumption that some of the billed hours were necessarily duplicative.

Finally, Monsanto claims that the court erred in awarding Spray-Rite fees billed for the time spent on issues for which Spray-Rite did not obtain recovery. Spray-Rite's original complaint included four counts: a conspiracy to restrain trade count, 15 U.S.C. § 1, a Robinson-Patman Act discriminatory price count, 15 U.S.C. § 13(a), and two monopolization counts, 15 U.S.C. § 2. Spray-Rite dropped the Robinson-Patman and monopolization counts before trial. Monsanto argues that section 4 of the Clayton Act permits recovery of attorney's fees only for time billed on issues on which the plaintiff prevailed. Monsanto contends that Spray-Rite cannot recover attorneys' fees for time expended on the Robinson-Patman and monopolization counts because Spray-Rite did not prevail on those charges. *See Bryam Concretanks, Inc.* v. *Warren Concrete Products Co.,* 374 F.2d 649 (3d Cir. 1967).

"[O]nly work devoted to the successful recovery of treble damages may be compensated. However, to the extent that work bore on both a successfully asserted antitrust claim and other, noncompensable claims, that work may be fully taken into account." *Kane* v. *Martin Paint Stores, Inc.*, 439 F. Supp. 1054, 1057 (S.D.N.Y. 1977), *aff'd without opinion*, 578 F.2d 1368 (2d Cir. 1978) (citation omitted). Spray-Rite may recover for time expended on the Robinson-Patman and monopolization counts only if that work also bore on the successfully litigated conspiracy charge. To recover on the Robinson-Patman claim, Spray-Rite would have had to prove that Monsanto charged a discriminatory price within some limited, relevant market. Moreover, Spray-Rite would have had to have been prepared to rebut an affirmative defense that Monsanto's discriminatory price was needed to meet competition. *Vanco Beverages, Inc.* v. *Falls City Industries, Inc.*, 654 F.2d 1224 (7th Cir. 1981). To prevail on the monopolization counts, Spray-Rite would have borne the burden of proving that Monsanto possessed monopoly power in the relevant market and that Monsanto wilfully acquired or maintained that power. *Chillicothe Sand & Gravel Co.* v. *Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980). Both of these counts require substantially different proof than that necessary to sustain Spray-Rite's burden on the conspiracy to restrain trade count. Monsanto is not required to compensate Spray-Rite for time devoted exclusively to developing the Robinson-Patman and monopolization counts. Spray-Rite's petition did not indicate what portion of the billed time was devoted to developing the two abandoned theories. On remand Spray-Rite will bear the burden of showing which portion of the billed time was devoted to the successfully litigated conspiracy charge.

CONCLUSION

For the reasons stated in this opinion, we affirm the amended judgment of the district court against Monsanto if Spray-Rite will accept a remittitur of $172,412. If Spray-Rite refuses to accept the remittitur, the judgment will be reversed and the case remanded for a new trial on the question of damages. We dismiss Spray-Rite's cross-appeal, and affirm in part and reverse and remand in part the award of $895,747.80 in attorney's fees.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

APPENDIX B

IN THE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
June 28, 1982

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. PHILIP NICHOLS, JR., Associate Judge*
Hon. HARLINGTON WOOD, JR., Circuit Judge

Nos. 80-1621, 80-2232, 80-2233 and 80-2624

SPRAY-RITE SERVICE CORPORATION, an Iowa corporation,

Plaintiff-Appellee,

vs.

MONSANTO COMPANY, a Delaware corporation,

Defendant-Appellant.

Appeals from the United States District Court for the Northern District of Illinois, Western Division.
No. 72-C-12—**Stanley J. Roszkowski**, *Judge.*

JUDGMENT—ORAL ARGUMENT

This cause was heard on the record from the United States District Court for the Northern District of Illinois, Western Division, and was argued by counsel.

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* This The Honorable Philip Nichols, Jr., Associate Judge of the United States Court of Claims, is sitting by designation.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment against Monsanto is AFFIRMED; the amended judgment against Monsanto is AFFIRMED, with conditions; Spray-Rite's cross-appeal is DISMISSED; the award of $895,747.80 in attorney's fees is AFFIRMED IN PART AND REVERSED AND REMANDED IN PART, in accordance with the opinion of this Court filed this date. Each party is to bear its own costs on appeal.

APPENDIX C

APPENDIX C

IN THE

United States District Court

For the Northern District of Illinois,
Western Division

SPRAY-RITE SERVICE CORPORATION,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Civil Action File No. 72-C-12

JUDGMENT

This action came on for trial before the Court and a jury, Honorable Stanley J. Roszkowski, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that judgment is hereby entered against the defendant, Monsanto Company, and in favor of plaintiff, Spray-Rite Service Corporation, and assesses damages in the amount of $10,500,000.00 plus interest at the legal rate.

H. STUART CUNNINGHAM
Clerk of Court

Dated: February 25, 1980

By: C. M. SAUNDERS,
Deputy Clerk

APPENDIX D

APPENDIX D

IN THE

United States District Court

For the Northern District of Illinois,
Western Division

SPRAY-RITE SERVICE CORPORATION,

Plaintiff,

vs.

MONSANTO COMPANY,

Defendant.

Cause No. 72-C-12
Stanley J. Roszkowski,
United States District Judge
February 19, 1980.

TRANSCRIPT OF RULING ON MONSANTO COMPANY'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF TESTIMONY

THE COURT: All right, with all due respect, Mr. Bartlit, I think that there is some evidence that I think would allow that to go to the jury on the question of whether or not there was such a conspiracy.

MR. BARTLIT: You see, my point—excuse me.

THE COURT: And I think there was also some evidence whether there were certain customer and territorial restrictions regarding the distribution of defendant's products. It may be true that there may not be as much evidence on that point as I'm sure the plaintiff would like, but I think that is a factual question.

It seems to me that there is some evidence on that—at least the way I have heard the case. I think that you've got—the argument that you're making now may be a very good argument to make to the jury and I think—

MR. BARTLIT: Well, I guess I don't think so, your Honor.

THE COURT: Okay.

MR. BARTLIT: I just don't think—I don't think the jury is in a case like this capable of understanding these kinds of distinctions.

THE COURT: Well, you know, if they aren't, we ought not try any of these cases—I suppose we ought to agree with Justice Burger and not try any of these cases before a jury because they've got to understand these things, or at least we have to assume they understand them, and you pointed out to me the other day that they decided a case that you recently tried on the grounds that the plaintiff was guilty of contributory negligence.

MR. BARTLIT: Yes, sir, and that's what scares me.

THE COURT: That might scare you. But, I understand your position. I just think that it probably—I'm going to let it—at least at this point, I will let it go to the jury.

MR. BARTLIT: I understand.

THE COURT: Yes.

APPENDIX E

IN THE

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604
September 8, 1982

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. PHILIP NICHOLS, Associate Judge[1]
Hon. HARLINGTON WOOD, JR., Circuit Judge

Nos. 80-1621, 80-2232, 80-2233 and 80-2624

SPRAY-RITE SERVICE CORPORATION, an Iowa corporation,

Plaintiff-Appellee,

vs.

MONSANTO COMPANY, a Delaware corporation,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Western Division. No. 72-C-12—Stanley J. Roszkowski, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by the Defendant-Appellant Monsanto Company, no judge in active service has requested a vote thereon, [2] and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

[1]The Hon. Philip Nichols, Associate Judge of the United States Court of Claims, is sitting by designation.

[2]The Hon. Richard D. Cudahy and the Hon. Richard A. Posner did not participate in the consideration of the suggestion for rehearing *en banc*.

No. 82-914

In The

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

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Dated: May 14, 1983

CHAS. P. YOUNG CHICAGO, INC.

PETITION FOR CERTIORARI FILED DECEMBER 7, 1982.
CERTIORARI GRANTED FEBRUARY 28, 1983.

No. 82-914

In The

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

CHAS. P. YOUNG CHICAGO, INC.

INDEX

NOTE: The appendix filed in support of the petition for certiorari contains the following materials, which are omitted from this Joint Appendix:

App. A: Seventh Circuit Opinion, June 28, 1982.

App. B: Seventh Circuit Order affirming judgment against Monsanto Company, June 28, 1982.

App. C: District Court Judgment, February 22, 1980.

App. D: Transcript of District Court denial of Monsanto's motion for directed verdict at the close of testimony, February 19, 1980.

App. E: Seventh Circuit Order denying petition for rehearing and suggestion for rehearing *en banc*, September 8, 1982.

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES IN COURTS BELOW

February 24, 1972—Original Complaint filed.

May 12, 1972—Answer of Monsanto Company to the Complaint.

December 4, 1975—Amended Complaint filed.

January 27, 1976—Answer of Monsanto Company to the Amended Complaint.

January 7, 1980—Final Pretrial Order entered.

February 21, 1980—Minute Order: Jury finds for the plaintiff. District Court enters judgment in favor of the plaintiff on the jury's verdict.

February 22, 1980—Judgment on Jury Verdict.

March 3, 1980—Monsanto Company's Motion for Judgment Notwithstanding the Verdict or, in the Alternative, for New Trial, and to set Briefing Schedule.

March 28, 1980—Amended Judgment on Jury Verdict.

July 15, 1980—District Court Order denying Monsanto Company's Motion for New Trial.

August 7, 1980—Monsanto Company's Notice of Appeal.

December 5, 1980—Brief for Defendant-Appellant Monsanto Company and Appendix.

March 16, 1981—Brief for Plaintiff-Appellant-Cross-Appellant Spray-Rite Service Corporation.

April 22, 1981—Reply Brief for Defendant-Appellant-Cross-Appellee Monsanto Company.

June 28, 1982—Seventh Circuit's Opinion.

July 12, 1982—Petition of Defendant-Appellant Monsanto Company for Rehearing with Suggestion that Rehearing be *en banc*.

August 3, 1982—Answer of Plaintiff-Appellee Spray-Rite to Defendant-Appellant Monsanto Company's Petition for Rehearing.

August 5, 1982—Reply of Petitioner Monsanto Company to Answer of Spray-Rite Regarding Petition for Rehearing *en banc.*

September 8, 1982—Seventh Circuit Order denying Monsanto Company's Petition for rehearing and suggestion for rehearing *en banc.*

In The

United States District Court

For The
Northern District of Illinois,
Western Division

SPRAY-RITE SERVICE CORPORATION, an Iowa corporation, *Plaintiff,* vs. **MONSANTO COMPANY, a Delaware corporation,** *Defendant.*		**NO. 72 C 12** **JURY DEMANDED**

AMENDED COMPLAINT

Plaintiff, Spray-Rite Service Corporation ("Spray-Rite") by its attorneys, complains of defendant, Monsanto Company ("Monsanto") as follows:

COUNT I

JURISDICTION AND VENUE

1. This action arises under the antitrust laws of the United States, more particularly Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) and Sections 2, 4 and 16 of the Clayton Antitrust Act as amended by the Robinson-Patman Act (15 U.S.C. §§ 13, 15 and 26). Plaintiff brings this action to recover damages.

2. Monsanto transacts business and is found within the Northern District of Illinois and has during the period of the violations alleged herein transacted business and was found within the Northern District of Iliionis. Many of the unlawful acts alleged herein or done pursuant to the combination and conspiracy alleged herein, have been performed

within the Northern District of Illinois, and the commerce described hereinafter is carried on in part within this District.

Parties

3. Plaintiff, Spray-Rite, is an Iowa corporation, having its principal place of business in the State of Illinois. Spray-Rite sold agricultural pesticides, primarily in the Corn Belt of the United States until approximately 1972, when, because of the unlawful acts alleged herein, Spray-Rite was forced to terminate its business.

4. Defendant, Monsanto, is a Delaware corporation, having its principal place of business in the State of Missouri. Monsanto manufactures and sells a widely diversified line of chemical products to many different industries throughout the United States and the world. It operates over 60 domestic plants and research facilities, and many foreign facilities. During 1974, Monsanto enjoyed sales of about $3.50 billion. Monsanto markets its chemical products through product groups, one group of which deals in chemical products for agriculture, including agricultural pesticides. The agricultural chemical products group accounted for 8.4%, 8.9%, 10.0% and 11.7% of all sales by Monsanto and its subsidiaries in calendar years 1968, 1969, 1970 and 1974, respectively. Monsanto is one of the largest manufacturers of pesticides in the United States. Spray-Rite had a contract with Monsanto to distribute certain of Monsanto's pesticides in the Corn Belt until the events of 1968 as hereinafter described.

Definitions

5. As used in this complaint, "pesticides" means chemicals and chemical compounds used in agriculture to destroy or control one or more types of harmful plants, insects or fungi; "herbicides" means a pesticide used to destroy or control harmful plants; "Corn Belt" means the upper and

central midwestern United States; "contract distributor" means a distributor who has entered into a contract with Monsanto to distribute its pesticides and "co-conspirators" means Monsanto's subsidiaries and agents, all contract distributors of Monsanto pesticides on and after 1968, including but not limited to Associated Producers, Inc., Brayton Chemical Co., Hopkins Agricultural Chemical Co., Laverty Sprayers, Inc., Mid-State Chemical Co., Midwest Agricultural Warehouse Co. and Van Diest Supply Co. and dealers of Monsanto pesticides in the Corn Belt and throughout the United States.

Trade and Commerce

6. The pesticides which are the subject of this complaint move regularly in interstate commerce. The unlawful acts and practices alleged in this complaint operate directly on such products in connection with their manufacture, sale and interstate shipment and thereby directly restrain and adversely affect interstate commerce.

7. Monsanto conducts its business in interstate commerce and the unlawful acts and practices complained of herein occurred in the flow of such commerce.

8. Spray-Rite has sold pesticides in the Corn Belt since 1956. From its inception, Spray-Rite has been a pioneer and innovator in the application of pesticides as that technology has developed since World War II, and was instrumental in improving the sales distribution of pesticides in the Corn Belt. Spray-Rite continued thereafter to offer superior technical and marketing services to its customers by concentrating on and specializing in the distribution of pesticides. Spray-Rite has sought to sell to customers in large lots, early in the season and on a cash basis whenever possible. Consequently, Spray-Rite has had a negligible bad debt experience. For these reasons and because of its otherwise efficient methods of operation, Spray-Rite had been able to operate successfully by offering competitive prices to its customers.

9. Since about 1957 and continuing until October 28, 1968, Spray-Rite was a contract distributor of Monsanto herbicides. From time to time during that period, Monsanto and Spray-Rite executed agreements entitled Formulated Pesticide Products Distributor Agreements, but Spray-Rite's distributorship and course of dealing with Monsanto was continuous during that period of time regardless of the existence, or lack of existence, of such executed Agreements. While a Monsanto contract distributor, Spray-Rite promptly paid its invoices to Monsanto, participated in Monsanto advertising and promotional programs and otherwise performed satisfactorily as a distributor of Monsanto herbicides in all lawful and material respects. During the years 1966, 1967 and 1968, Spray-Rite purchased approximately \$312,231.00, \$642,498.00 and \$496,875.00, respectively, of Monsanto herbicides from Monsanto. By 1967, Spray-Rite was one of Monsanto's largest volume distributors of Monsanto herbicides in the Corn Belt. Spray-Rite anticipated substantial increases during future years in its purchases of Monsanto herbicides because the demand for such herbicides in the Corn Belt was expanding rapidly and substantially, in part due to the efforts of Spray-Rite. In reliance on continuing and growing as a Monsanto distributor, Spray-Rite invested substantial capital and labor in its business. As a result, Spray-Rite has the modern warehouse capacity to carry substantial pesticide inventories and has vehicles suitable for efficient delivery of such pesticides. Spray-Rite also developed, at great expense, valuable and unique lists of pesticide customers and potential customers for its growing business.

10. An additional factor contributing to Spray-Rite's record of growth was its ability to hold itself out to its customers and potential customers as carrying a "full line" of pesticides for application in the Corn Belt. It has been the practice in the Corn Belt for distributors of pesticides to carry such a "full line" because purchasers of pesticides usually purchase all their requirements from a single source of supply. In 1968 and in other years, it was essential for a

full line pesticide distributor in the Corn Belt to carry the popular patented pesticides manufactured by Monsanto and by Ciba-Geigy Corporation (formerly Geigy Corp.). Such pesticides included Randox, Ramrod and Lasso manufactured by Monsanto, and Atrazine (Aatrax) and Diazinon manufactured by Ciba-Geigy Corporation. Spray-Rite was a distributor of such Monsanto and Ciba-Geigy Corporation pesticides in 1968. A distributor of pesticides in the Corn Belt who did not carry all or substantially all such pesticides (or their currently popular equivalents) was and is at a competitive disadvantage with other distributors who do, because of the aforedescribed practice of pesticide purchasers to purchase from a single source of supply.

The Violations

11. Beginning in or about 1967 and continuing to the present time, Monsanto and the co-conspirators have combined, conspired and agreed with one another to eliminate and have eliminated Spray-Rite as a competitor in the sale of Monsanto herbicides and other pesticides in the Corn Belt and to restrain trade in the sale of Monsanto herbicides and other pesticides in the Corn Belt. Such combinations, conspiracies and agreements include the following unlawful acts and practices:

a. Monsanto and the co-conspirators have determined, fixed and maintained prices at which distributors of Monsanto herbicides may resell such herbicides;

b. Monsanto and the co-conspirators have restricted the territory in which distributors of Monsanto herbicides may resell such herbicides;

c. Monsanto and the co-conspirators have restricted the type of customer to whom distributors of Monsanto herbicides may resell such herbicides;

d. Monsanto, in combination, conspiracy and agreement with its co-conspirators, terminated Spray-Rite

and other contract distributors of Monsanto herbicides to punish and coerce distributors to comply with Monsanto and its co-conspirators' policies and practices of fixing and maintaining prices and restricting territory and types of customers;

e. Monsanto and the co-conspirators have reported among themselves the names of distributors who have failed to comply with the policies and practices of fixing and maintaining prices and restricting territories and types of customers in order to coerce compliance with such policies;

f. Monsanto and the co-conspirators have manipulated the price and terms of sale of Monsanto herbicides and the availability of Monsanto herbicides to Monsanto distributors in order to punish and coerce distributors to comply with the policies and practices of fixing and maintaining prices and restricting territories and types of customers;

g. Monsanto and the co-conspirators boycotted Spray-Rite in order to eliminate Spray-Rite as a competitor and to coerce distributors of Monsanto herbicides to comply with the policies and practices of fixing and maintaining prices and restricting territories and types of customers;

h. Monsanto and the co-conspirators have invoked and enforced a restrictive herbicide shipping program in order to enforce the policies and practices of fixing and maintaining prices and restricting territories and types of customers;

i. Monsanto and the co-conspirators have invoked and enforced a herbicide distributor and dealer compensation program in order to enforce the policies and practices of fixing and maintaining prices and restricting territories and types of customers;

j. Monsanto and the co-conspirators have invoked and enforced a herbicide distributor early take program in order to enforce the policies and practices of fixing and maintaining prices and restricting territories and types of customers;

k. In the mid 1960's through and including 1969, Monsanto established approximately 155 Monsanto Agricultural Centers ("MAC centers") most of which were located in the Corn Belt. The MAC centers were, for the most part, Monsanto-owned sales outlets which offered and sold Monsanto pesticides and other agricultural products to customers and potential customers of Spray-Rite. The MAC centers offered and sold to such customers and potential customers, Monsanto herbicides in combination with other agricultural products at "package" prices and at generally lower prices than distributors of ~~Monsanto~~ herbicides were offering. Monsanto, through its MAC centers, sold Monsanto herbicides to customers and potential customers of Spray-Rite at prices lower than the prices at which Monsanto sold Monsanto herbicides of like grade and quality to Spray-Rite. Monsanto utilized the sales of herbicides through its MAC centers to destroy the business of Spray-Rite.

l. Monsanto has sold and continues to sell herbicides of like grade and quality at discriminatory prices and in connection with discriminations in services and facilities, by means of devices, acts and practices such as indirect price and service concessions, commissions, rebates and advertising and other allowances.

Effects of Violations

12. The aforesaid unlawful acts and practices have caused, among other things, the following unlawful effects:

a. The resale prices of Monsanto herbicides have been fixed and maintained at arbitrary and non-competitive levels;

b. The territory in which distributors of Monsanto herbicides may resell Monsanto herbicides has been restricted;

c. The type of customer to whom distributors of Monsanto herbicides may resell Monsanto herbicides has been restricted;

d. The number of distributors of Monsanto herbicides and other pesticides has been reduced with the result that competition in the sale of Monsanto herbicides and other pesticides in the Corn Belt has been restricted;

e. The price at which Spray-Rite could purchase Monsanto herbicides, after being terminated by Monsanto as a contract distributor, has been fixed and maintained at arbitrary and non-competitive levels;

f. The supply of Monsanto herbicides available to Spray-Rite has been restricted;

g. Distributors of Monsanto herbicides and other pesticides in the Corn Belt have been coerced into complying with the policies of Monsanto and its co-conspirators of fixing and maintaining prices, restricting territories and types of customers through policing, boycotting, terminating non-complying contract distributors, selectively compensating distributors, selectively shipping herbicides and manipulating the terms of sale and the supply of Monsanto herbicides;

h. Purchasers of Monsanto herbicides and other pesticides have been substantially hindered from choosing other distributors and from purchasing at competitive prices.

i. Spray-Rite has been eliminated as a competitor in the sale of Monsanto herbicides and other pesticides. It has experienced net operating losses of $37,067.00, $11,513.00, $61,763.00 and $65,469.00, respectively, in 1969, 1970, 1971 and 1972, its volume of business and its

potential for acquiring new business was damaged and ultimately its business was destroyed.

13. As a direct and proximate result of the unlawful combinations, conspiracies, agreements, acts and practices alleged against Monsanto and the co-conspirators herein, Spray-Rite has been irreparably injured in its business and property and its business and property have been destroyed. Spray-Rite is entitled to have judgment against Monsanto in treble the amount of its damages which are at least $1,825,000.00.

14. The foregoing combinations, conspiracies and agreements and the acts and practices pursuant thereto of Monsanto and the co-conspirators were and are in restraint of trade or commerce among the several states in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

COUNT II

1-14 Paragraphs 1-14 of Count 1 are realleged as paragraphs 1-14 of Count II.

15. The foregoing acts and practices of Monsanto alleged in subparagraphs 11(k) and 11(l) are in violation of Section 2(a), (c), (d) and (e) of the Robinson-Patman Act (15 U.S.C. § 13(a), (c), (d) and (e)).

Relief Requested

Wherefore, plaintiff, Spray-Rite prays:

1. That this Court adjudge and decree that the combinations, conspiracies, agreements, acts and practices charged against Monsanto herein were and are in violation of Section 1 of the Sherman Antitrust Act (15 U.S.C. § 1) and Section 2(a), (c), (d) and (e) of the Clayton Act (15 U.S.C. § 13(a), (c), (d) and (e)).

2. That this Court enter judgment in favor of Spray-Rite against Monsanto in the amount of at least $5,475,000.00.

3. That Spray-Rite recover from Monsanto its costs in this suit including its reasonable attorneys' fees incurred herein, as provided by Section 4 of the Clayton Act (15 U.S.C. § 15).

4. That Spray-Rite have such other additional and different relief as the nature of the case may require or as the Court shall deem just.

PLAINTIFF DEMANDS A TRIAL BY JURY.

/s/ RICHARD F. VITKUS
Richard F. Vitkus

One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 786-5600

Attorney for Plaintiff

OF COUNSEL:
WINSTON & STRAWN
One First National Plaza
Suite 5000
Chicago, Illinois 60603
(312) 786-5600

[Certificate of service omitted in printing.]

In The

United States District Court

For The
Northern District of Illinois,
Western Division

SPRAY-RITE SERVICE CORPORATION, **an Iowa Corporation,** *Plaintiff,* **vs.** **MONSANTO COMPANY,** **a Delaware corporation,** *Defendant.*	**NO. 72 C 12**

ANSWER TO AMENDED COMPLAINT

Defendant, MONSANTO COMPANY, by its attorneys, for its answer to the Amended Complaint:

COUNT I

1. Denies the allegations in paragraph 1, except admits that plaintiff purports to bring this action for damages under the antitrust laws of the United States.

2. Admits that it is found or transacts business within the Northern District of Illinois and denies the remaining allegations of paragraph 2.

3. Denies knowledge or information sufficient to form a belief as to the allegations of the first sentence; admits Spray-Rite has sold agricultural pesticides in the Corn Belt and denies the remaining allegations of the second sentence.

4. Denies the allegations of the last sentence in paragraph 4, specifically including any legal conclusion with regard to the contractual relationship between Spray-Rite and Monsanto, except that it admits Spray-Rite was at one

time a distributor of certain Monsanto Company pesticides in a portion of the Corn Belt and was not reappointed as a distributor in 1968; admits the remaining allegations contained in paragraph 4.

5. Admits the complaint purports to use the definitions set forth in paragraph 5 and denies the remaining allegations in paragraph 5, specifically including the inference that there exist any "co-conspirators."

6. Denies the allegations of paragraph 6, except admits that some of its pesticide sales move in interstate commerce. Defendant specifically denies that all pesticide sales made by it are in commerce.

7. Admits the allegations of paragraph 7, except that it denies the existence of the unlawful acts and practices referred to in paragraph 7.

8. Admits Spray-Rite has sold pesticides in the Corn Belt; denies the allegations of the second and third sentences of paragraph 8 and denies knowledge or information sufficient to form a belief as to the remaining allegations in paragraph 8.

9. Denies the allegations in the first sentence of paragraph 9, specifically including any legal conclusion with regard to the contractual relationship between Spray-Rite and Monsanto, and avers that Spray-Rite was a distributor of Monsanto herbicides from 1957 until August 31, 1968; admits that from time to time Monsanto and Spray-Rite executed certain agreements entitled "Formulated Pesticide Products Distributor Agreements," but denies any legal conclusions contained in the second and third sentences of paragraph 9 with regard to the contractual relationship between Spray-Rite and Monsanto; admits the remaining allegations in the third sentence of paragraph 9, except that it denies Spray-Rite performed satisfactorily as a Monsanto distributor; denies the allegations in the fourth sentence of paragraph 9 and avers that during the years 1966, 1967 and 1968 Spray-Rite purchased approximately $298,000, $625,000 and

$483,000, respectively, of Monsanto herbicides from Monsanto; denies the allegations in the fifth sentence of paragraph 9 and denies knowledge or information sufficient to form a belief regarding the remaining allegations in paragraph 9.

10. Admits Spray-Rite was a distributor of Monsanto herbicides until August 31, 1968; denies the allegations contained in the second, third, fourth, and last sentences of paragraph 10, and denies knowledge or information sufficient to form a belief regarding the remaining allegations in paragraph 10.

11. Denies the allegations contained in paragraph 11 and in paragraphs 11(a) through 11(1), except that it admits that it established Monsanto Agricultural Centers in the mid-1960's, that some of these Centers were located in the Corn Belt, and that these Centers sold Monsanto pesticides and other agricultural products.

12-14. Denies the allegations contained in paragraphs 12 through 14.

COUNT II

1-14 The averments contained in paragraphs 1-14 of the answer are hereby incorporated as defendant's answer to paragraphs 1-14 of Count II.

15. Denies the allegations contained in paragraph 15 of Count II.

AFFIRMATIVE DEFENSES TO COUNTS I AND II

First Defense

The complaint fails to state a claim upon which relief can be granted.

Second Defense

The claims contained in the complaint are barred in whole or in part by the applicable statute of limitations.

AFFIRMATIVE DEFENSE TO COUNT II ONLY

First Defense

Any differentials in prices charged by defendant made only due allowance for differences in the cost of sale or delivery resulting from the differing methods or quantities in which commodities were sold or delivered to purchasers.

Second Defense

Any differential in price between different purchasers of defendant's commodities of like grade and quality was made in good faith to meet an equally low price of a competitor or the services or facilities furnished by a competitor.

Third Defense

Any difference in prices of commodities sold by defendant was in response to changing conditions affecting a market or the marketability of the products concerned.

Fourth Defense

The sales of defendant's products complained of were not in commerce within the meaning of the Robinson-Patman Act.

Answering the unnumbered WHEREFORE paragraph and sub-paragraphs 1-4 therein, defendant denies that plaintiff is entitled to the relief therein requested or to any relief whatsoever.

WHEREFORE, defendant MONSANTO COMPANY demands judgment dismissing the complaint and granting

such other and further relief as to the Court may seem just and proper.

/s/ FRED H. BARTLIT, JR.
Fred H. Bartlit, Jr.
Attorney for Defendant,
MONSANTO COMPANY

Of Counsel:

ROY E. POTTER
Monsanto Company
St. Louis, Missouri

KIRKLAND & ELLIS
200 East Randolph Drive
Chicago, Illinois 60601
(312) 861-2000

DATED: January 27, 1976

[Certificate of service omitted in printing.]

In The

United States District Court

For The
Northern District of Illinois,
Western Division

SPRAY-RITE SERVICE CORPORATION, **an Iowa Corporation,** *Plaintiff,* **vs.** **MONSANTO COMPANY,** **a Delaware corporation,** *Defendant.*	**NO. 72 C 12 W**

Transcript of Proceedings
February 20, 1980
Volume XXIII

[Excerpts from Jury Instructions]

* * *

[4348]

This antitrust lawsuit is brought by the plaintiff under Section 1 of the Sherman Antitrust Act, which deals with restraints of trade and provides that:

> "Every contract, combination . . . or conspiracy, in restraint of trade or commerce . . . is . . . illegal . . . ."

All business contracts restrain trade to some degree, but the Sherman Act does not prohibit all contracts. By prohibiting restraints of trade, the antitrust laws mean that unreasonable restraints of trade are prohibited; reasonable restraints of trade are not prohibited by the antitrust laws.

[4349]

In order to recover under Section 1 of the Sherman Act, the plaintiff has the burden of proving each of the following propositions:

1. That there was an agreement, conspiracy or combination between the defendant and one or more non-defendant co-conspirators to accomplish one or more of the alleged violations of Section 1 of the Sherman Act;

2. That one or more of these alleged antitrust violations by the defendant was a direct and material cause of injury to the plaintiff's business and property;

3. That the plaintiff thereby sustained damages in an amount capable of reasonable ascertainment.

If you find from your consideration of all the evidence that each of these propositions have been proved, your verdict should be for the plaintiff, but on the other hand, if you find from your consideration of all the evidence that any of these propositions has not been proved, your verdict should be for the defendant.

The plaintiff in this case seeks damages for injury to his business and property claimed to have been suffered or sustained as a result of alleged violations by the defendant of the antitrust laws of the United States.

Specifically, the plaintiff claims:

[4350]

1. That defendant and one or more of its distributors conspired or combined to fix, set or stabilize the resale price of defendant's product;

2. That pursuant to and as a part of, this resale price maintenance plan the defendant has imposed, and the non-defendant co-conspirators have acquiesced in, certain customer and territorial restrictions regard.ng the distribution of defendant's product;

3. That plaintiff was terminated as a contract distributor by defendant as a result of said conspiracy or combination;

4. That after plaintiff's termination defendant and one or more of its distributors conspired or combined to restrict plaintiff's access to defendant's products.

The defendant Monsanto denies these claims. Monsanto contends that it made the decision not to renew plaintiff, Spray-Rite's contract independent and unilaterally for its own business reasons and that plaintiff's business was affected by normal competitive forces and not by any conspiracy.

* * *

[4351]

A conspiracy is a combination of two or more persons, by concerted action or by coercion resulting in acquiescence to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or to disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other and may have assembled together and discussed common aims and interest, does not necessarily establish proof of the existence of a conspiracy. However, such business behavior is circumstantial evidence which you may consider with all the other evidence in the case in arriving at your verdict.

The evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by word spoken or in writing, stated

[4352]

between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished. What a preponderance of the evidence in the case might show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.

The evidence in the case need not show that all the means or methods set forth in the plaintiff's complaint were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such. What a preponderance of the evidence in the case must show is that the alleged conspiracy was formed; and that one or more of the means or methods described in the complaint was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy alleged in the plaintiff's complaint; and that two or more persons, including the defendant, were knowingly members of the conspiracy alleged in the complaint.

A conspiracy requires proof that there be a single plan and purpose, the nature and general scope of which is known to each person who is claimed to be a member

[4353]

of the conspiracy. Unless the individuals involved understood from something that was said or done that they were in fact committed to the purposes of the conspiracy, there is no violation. There is no such thing as an unknowing or unwitting conspirator.

There cannot be a conspiracy unless there is a commitment between two or more persons working for different companies. To prove a conspiracy here, plaintiff must prove by a preponderance of the evidence that Monsanto employees conspired with persons who did not work for Monsanto.

[4354]

The fact that distributors complain about prices or anything else does not in itself mean that a conspiracy existed. Even if you find that Monsanto acted in exactly the way that complainants would have wished, that does not prove the existence of a conspiracy; it would, however, be evidence that you can take into consideration in deciding whether or not a conspiracy existed.

In your consideration of the evidence in the case as to the conspiracy charged, you should first determine whether or not the conspiracy existed, as alleged in the complaint. If you conclude that the conspiracy did exist, you should next determine whether or not the defendant, or one or more of its distributors were knowingly members of the conspiracy.

If it appears from a preponderance of the evidence in the case that the conspiracy alleged in the plaintiff's complaint was knowingly formed, and that the defendant or one or more of its distributors, normally became members of the conspiracy, either at the inception or beginning of the plan, or afterwards, then the success or failure of the conspiracy to accomplish the common object or purpose is immaterial, so long as the plaintiff sustained some damage as a result of the conspiracy.

* * *

[4355]

Under Section 1 of the Sherman Act, there are agreements, conspiracies and combinations whose nature and effect on competition are conclusively presumed to be unreasonable and therefore illegal, without any inquiry as to the harm they have caused or the business excuse for their use—they are "illegal per se."

Among the practices which the courts have declared to be per se illegal, and therefore unlawful in and of themselves, are price-fixing or resale price maintenance and concerted refusals to deal. If you find that the defendant participated in any agreement, conspiracy or combination to fix or stabilize resale prices or to refuse to deal with the plaintiff,

then the defendant has violated Section 1 of the Sherman Act. Once the existence of such an agreement, conspiracy or combination has been established, no evidence of actual public injury is required, and no evidence of reasonableness can be considered in justification. Such actions violate the antitrust laws.

Any conspiracy or combination formed for the purpose and with the effect of raising, depressing, fixing,

[4356]

rigging or stabilizing the price of any commodity in interstate commerce is illegal per se.

Where a manufacturer undertakes to distribute its goods through a chain of independent dealers, the consumers' ability to purchase at a free market price will be enhanced by the retailer's unrestricted ability to set his retail price at the level he feels most commensurate with local demand.

If you find that the defendant conspired or combined with one or more of its distributors to raise, depress, fix, rig or stabilize the resale price of defendant's products, then the defendant violated Section 1 of the Sherman Act.

It is also per se illegal for a manufacturer to utilize customer or territorial restrictions pursuant to or as a part of, a comprehensive price-fixing plan or an agreed refusal to deal. Therefore, if you find that the defendant conspired or combined with one or more of its distributors to utilize the defendant's customer or territorial restraints in order to effectuate price stabilization or resale price maintenance, or to detect and prevent resale price-cutting, or to effectuate any restriction on plaintiff's access to defendant's products, then the defendant has violated Section 1 of the Sherman Act.

It is also unlawful for a manufacturer to

[4357]

terminate or threaten to terminate one of its distributors for the reason that the distributor objected to, or departed from either the manufacturer's price-fixing or stabilization plan or

any customer or territorial restraints which are part of that plan. Therefore, if you find that termination or threat of termination was utilized by the defendant as a coercive tool against the plaintiff or any other distributor or defendant to force adherence to any aspect of a resale price maintenance plan, such termination or threat of termination is unlawful. It does not matter whether the defendant initiated the coercion, or whether it was done in response to pressure or complaints from one or more of its distributors.

A termination or threat of termination to compel adherence to any aspect of a resale price maintenance plan is unlawful, whether or not there was any reasonable justification.

* * *

[4363]

The law recognizes a limited right in the manufacturer to select its distributors, but that right is neither absolute nor exempt from regulation. If the manufacturer's selection is accompanied by unlawful purpose, conduct or agreement, it violates the Sherman Act.

A manufacturer may announce suggested resale prices and refuse to sell to a distributor which refuses to abide by those suggested prices. However, the manufacturer's conduct must be totally independent. In deciding whether the manufacturer's conduct was completely independent and unilateral, you should look to what the participants did, rather than the words they used.

Therefore, the defendant's limited right to choose its distributors does not include the right to, in any way, conspire or combine with one or more of its distributors to fix or stabilize resale prices, or to refuse to deal, or to commit any other act which has been described in these instructions as a per se violation of the antitrust laws.

A manufacturer has the right to print suggested prices on its products, to advertise those prices, to issue lists of suggested resale prices, and to send those price lists to its distributors or other customers. A manufacturer may also ask its customers to follow such suggested prices. However, a manufacturer may not conspire

[4364]

or combine with its distributors so that the distributors are required to sell at the suggested prices or to raise, fix or stabilize the prices charged by the distributors to their customers.

The fact that a program may have an effect on prices, even raising them, does not mean that it is part of a price-fixing plan. Imposing normal competitive requirements on a distributor, such as encouraging a distributor to advertise, may affect the distributor's costs, thereby indirectly affecting the price at which the distributor will sell the product. That does not necessarily mean that those requirements are part of a price-fixing conspiracy or combination, although you may find that they are part of a conspiracy or combination.

Defendant has the right to assign distributors to areas of primary responsibility and to assign points where distributors can pick up products or take delivery, so long as the decision to do these things is independent and not because of a price-fixing conspiracy or combination.

The defendant has a right to select distributors that it thinks will do the best job for it provided that in doing so the defendant's decision not to renew the plaintiff's contract was not made pursuant to a price-fixing conspiracy or combination.

Once plaintiff was not renewed as a Monsanto

[4365]

distributor, defendant had no obligation to sell to it on the same terms that it offered to its distributors who had contracts, unless its decision not to sell to Spray-Rite was a part of a conspiracy or combination to refuse to deal with Spray-Rite. The fact that some of Monsanto's policies may have affected the price paid by all non-contract sellers, including plaintiff, does not necessarily establish a conspiracy, but may be evidence which you can consider along with all the other evidence in the case in deciding whether a conspiracy existed.

Defendant has the right to implement incentive programs in order to encourage its distributors to perform certain marketing functions unless those programs are part of a price-fixing conspiracy or combination.

* * *

In The

United States District Court

For The
Northern District of Illinois,
Western Division

SPRAY-RITE SERVICE CORPORATION, an Iowa Corporation, *Plaintiff,* **vs. MONSANTO COMPANY, a Delaware corporation,** *Defendant.*	**NO. 72 C 12 W**

Transcript of Proceedings
February 21, 1980

[Jury's Answers to Special Interrogatories]

* * *

[2]

Question No. 1:

"Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or

[3]

stabilize resale prices on Monsanto herbicides?"

The answer is: "Yes."

Question No. 2:

"Were the compensation programs and/or areas of primary responsibility and/or shipping policy created by Monsanto pursuant to a conspiracy or

> combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?"

That answer is: "Yes."

Question No. 3:

> "Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto's herbicides after 1968?"

The answer is: "Yes."

PLAINTIFF'S EXHIBIT 19

SPRAY-RITE SERVICE CORPORATION
10216 N. Second (Hwy. 51 North)
Rockford, Illinois 61111
Phone 815-633-2357

April 12, 1968

Dear Customer:

Would you be interested in Geigy Sequestrene zinc chelates in liquid form?

Advantages:

a) Convenience of working with a liquid instead of a wettable powder.

b) Readily available to plants in correcting zinc deficiency in corn.

c) No increase in cost.

Enclosed, please find information sheet on Sequestrene zinc metal chelates.

Since the liquid form would seem a natural for liquid fertilizer plants, we are contemplating offering this material in 55 gallon drums at a cost of $2.94 per gallon. One gallon contains over 6 lbs. of elemental zinc (NA_2ZN liquid 6%).

Therefore:

a) Would you be interested in purchasing any drums of liquid zinc this year?

b) If yes, please give an estimate of gallons needed. (___ gallons). This is not an order, but just an indicator of approximate interest. If we can supply, we will phone, or write, informing you of availability.

c) Are you now adding any minor elements in chelated form to your liquid blends?

d) Would you be interested in attending a micro nutrient Seminar in LaSalle, Illinois area, at some future date?

e) We hope to have the latest information available regarding trace element needs in Mid-West area, and it will be available to all customer's of Spray-Rite Service Corporation.

Spray-Rite Service Corporation has been in agricultural chemical distribution for 17 years in the Northern one-half of Illinois, Southern Wisconsin and Eastern Iowa—handling only agricultural chemical compounds and equipment. Compounds such as Atrazine, Ramrod, Randox, Aldrin, Diazinon, DaSanit, Liquid Di-Syston, 2, 4-D, Activate 11-E (the pioneer in crop oil) and many more. Spray-Rite has played a very important part in introducing many, if not most, of above compounds and policy of selling as a brokerage house, we do a very large volume in above.

If we can be of help in liquid zinc or on any other matter, please write, or phone, Spray-Rite Service Corporation, c/o Don Yapp, 10216 No. Second St., Rockford, Illinois 61111. Telephone (area code) 815-633-2357.

Thank you.

Sincerely,
/s/ Don Yapp
Don Yapp, Pres.
Spray-Rite Serv. Corp.

DY:hf

PLAINTIFF'S EXHIBIT 20

SPRAY-RITE SERVICE CORPORATION
10216 No. Second Street
Rockford, Illinois, 61111
Tel. 1-815-633-2357

April 15, 1968

Dear Customers:

Another growing season is upon us—are you ready? Did you get to attend any of our supper Ag. Chemical meeting's earlier in the spring? If not, and we can help you in making a decision, please phone me, and if you wish to come to the office, please phone ahead and we will be happy to meet with you at any time, including Saturdays and Sundays, day or night.

We have a very good supply of all of the good chemical compounds at this writing. At this date, April 15, prices generally are equal, or below 1967, and in good supply.

We are happy to report volume sales of Ag. chemicals are as good, or better than, 1967. Below average sales increase on corn herbicides, but above average sales increase in soybean herbicides. Indicating, of course, fewer acres of corn, and more of soybeans.

The extremely dry conditions in the Western corn belt, is beginning to influence, to a degree, chemical and fertilizer demand in that area, and could put additional pressures on selling prices in this area. However, we are optimistic that it will rain and put things in a normal perspective. The supplies of Randox 20G are more than adequate at this time, and some really big bargains are being given. We are losing many dollars below our cost on every bag and the only question is how many dollars? We have 50,000 lbs. remaining on a first come, first served basis, and save many dollars per acre. Because of over supply of Randox 20G and bargain prices, it deserves your deep consideration if you apply granular materials on corn and soybeans. Example: you can

save form $2.75 to $3.00 per acre over Amiben granules and the difference in those materials isn't nearly that great. Hence: while supply lasts, you can't miss with Randox granule for soybean grass control. *1968 Best Buy—Randox 20G.*

Rootworms 1968 (resistant Northern and Western varieties). *Best buy—Diazinon 14G*—Use 7 to 8# per acre in 7 inch band ahead of packer wheel at planting time. If you purchase Diazinon here, we furnish pattern spreaders, free of charge. If you have already purchased Diazinon here and need these spreader plates, please inform and we will send them to you free of charge, as long as they last. If you have a cultivator applicator, and apply Diazinon 14G at this time, these spreader plates would not be necessary. We have a few Comfort cultivator applicators available. You should be aware, by this date, if you are, or are not in rootworm resistant areas. If you are, this resistant matter deserves your deep consideration if on 2nd, 3rd or more years of continuous corn. The extra $1.00 or so more cost per acre over Aldrin, can be lost 10 fold or more. Be especially alert to this one. Of the ten or so compounds being offered now, for this resistant rootworm, we feel Diazinon is as good, or better, in performance than the others, and in most cases much safer and more reliable (been on market much longer). We have put all our eggs in this basket—*Diazinon for 1968.*

The only other compound we are putting out for trial this year, is "*Dasanit*". This compound, as does most other newer compounds, carries the "*Skull and Crossbones*" markings, and deserves more caution in handling than does compounds we have been using in the past. "Dasanit" 10% granule is to be used at rate of 5 to 7½ lbs. per acre, spread over a 7" band ahead of packer wheel at planting time only. Dasanit 10G has complete label approval for planting time application. Dasanit 10G has toxicity rating similar to ____ granules which have been used by many growers, although not handled by ourselves. We urge those of you who know they have rootworm resistance to try a few acres of Dasanit in

comparison with Diazinon 14G. We would be happy if you would inform us of results and, in fact, to inform us to check for you about August 1st, give or take a week or so before or after, depending on rootworm egg hatch. Dasanit is supposed to be a long lasting insecticide, hence, the first planting, if very early (last of April or early in May) would be best time of application. The cost per acre is very similar to Diazinon 14G. Dasanit 10G is very new, just getting label approval within last month for planting time only application. The Chem-Agro Corporation, the manufacturer's of this compound, have very high hopes for the future for this material in the corn rootworm market. Hence; let's give it a trial.

Atrazine 80W—King of all corn herbicides, will remain master of all for some years to come. The best, cheapest, and most versatile.

We are getting our chemical equipment accessories department in full inventory: 6, 7 and 8 roller pumps, Ace centrifugal pumps, both 600 and 1,000 PTO models, hi volume transfer pumps with and without engine, nozzle bodies, elbows, tee's and caps in brass, iron and nylon: nozzle tips of most all sizes in brass and stainless steel, gauges 0-100 PSI, 3-way control valve, pressure regulators, Delavan new jet agitator (Better than block type) gate valve in most sizes, liquid fert. S.S. flood type tips in most sizes, hoses of all sizes from ⅛" thru 2" including hose couplings to go with it; granular equipment "Comfort" for planter or cultivator. We have a large inventory of older types of planter granular applicator (hopper handles for 2 rows instead of one) that will mount on many of older type planter models, both 2 row and 4 row (most new type granular applicators over the row will not mount on these older planters). These older models also would be good for dry "POP-UP" fertilizer application. Your net cost here is $15.00 per row complete (including hoppers and mounting brackets and tubes). At that price are as cheap as iron junk price. A fantistic buy if you can use, as long as they last. Also have supply of 4 Row Band Spray

attachments (everthing up to flo-control). You must have pump, pump hoses and control valve for a net price of $25.00 per 4 Row attachment. Here is an opportunity for you fellows wanting to band apply in spray form (Atrazine 80W) that are not now set up, but getting it done custom.

Enough for now—more to follow on other subjects within one week.

Sincerely,

/s/ Don Yapp

Don Yapp, Pres.
Spray-Rite Service Corporation

DY:hf

PLAINTIFF'S EXHIBIT 42

SPRAY-RITE SERVICE CORPORATION
10216 N. Second (Hwy. 51 North)
Rockford, Illinois 61111
Phone 815-633-2357

Dear Customer:

We have available the finest work yet printed on Atrazine carryover titled "Soil Factors contributing to Atrazine Carryover" by Russell S. Adams, Jr., Univ. of Minnesota. If you wish a copy, please drop us a line.

Lots of talk this year on "combinations" but don't you be *carried away* in your concern on "Carryover". Most companies suggest a 3 and 1 combination—Three of something else and one of Atrazine. The combination would be better if it was one and one. The combination would be still better if it had one of something else and 3 of Atrazine—and *best of all* if it was *straight Atrazine*.

Combinations will always be more costly; lest versatile, more irritational (Ramrod-Atrazine) less selective (Sutan-Atrazine, Lorax-Atrazine). The one compound heads and shoulders over all in weed control in corn—ATRAZINE—, and don't you forget it. In most cases residue is minor (end of fields and low spots). If you use less Atrazine naturally you have less residue and less Atrazine can be used if applied early-post with Activate 11-E (Spray Oil).

In the market combinations are having limited success and that is where they belong. In limited cases—certain particular circumstances—combinations could be beneficial. However, don't think for a minute, in most cases, that combinations with Atrazine is as good as Atrazine alone and this includes Primaze. Many, if not most, except in limited circumstances, that use combinations this year will be back to *straight Atrazine* next year. We will have complaints of irritations and "didn't last long enough" on Atrazine/Ramrod combinations. We will have complaints of corn

injury from others Atrazine/Sutan, Atrazine Lorax and Primaze.

Atrazine is "*King of the Road*" and will stay on top for a good many years to come in our estimation. I ask you—how are you going to make it better? Money is short in 1969 as it is in most years, but don't you sell your weed-killing dollar short.

Progress report this date, April 10, 1969: Spring is delayed and the "big rush" is just ahead. There is "*very low*" *farm chemical inventory in the field.* Please take note of that last statement and heed the consequence (shortages, delays and higher and possibly much higher prices).

The return from investment in farm chemicals has been exceptional this past decade. Tonage used has exceeded 25% each year these past 10 years. A gain of 25% each year over the previous year. Think about this—was it because of "super salesman" in our industry or a *three fold gain over costs.* Keep above in mind if you feel you can afford to "cut-back" in 1969. If you are losing money now you will lose far less if you use the proven "good compounds" we have available. You don't have to *gamble* on untried compounds, use the *proven sires* in the most effective method. Watch out for re-sellers pushing "Profit over Product".

You heard us explain our philosophies and attitudes on marketing pesticides at our dinner meetings in January, February and March at Rockford, DeKalb, Belvidere, Warren, Oregon, Rock Falls, Dixon, Mt. Morris, Marengo, Stockton, Peru, Monmouth, Freeport, Forreston, Walnut, Woodstock, Sycamore, and Morris in Illinois, and Janesville, Mt. Horeb, Stoughton, Beaver Dam, Darlington, Brodhead in Wisconsin. We hope you gained something from these meetings. Now, for those of you who haven't yet ordered your needs, we are again soliciting your order to help back our approach to more efficient, reputable, up-to-date marketing of pesticides. We have been in this business exclusively (no side-line here) for 17 years and hope to be another 17 with

your support. Go see your neighbor—jump in your truck—and come on over day or night including weekends. If still undecided give us a phone call at any hour.

We are running our business as you know it today *for your benefit* and we hope for our own—You be the Judge.

Sincerely yours,

/s/ Don Yapp

Don Yapp, President
Spray-Rite Serv. Corp.

DY/kd

PLAINTIFF'S EXHIBIT 134

1966 RAMROD MARKETING PLAN OF MONSANTO

* * *

[4]

III. Status and General Sales Strategy

Monsanto's position in the prime foxtail area in the heart of the Midwest Cornbelt is one of dominance by the Randox products (see map—page 4a). In this area, which includes central Illinois, the eastern ⅔ of Iowa, southern Minnesota and west central Indiana, Randox and Randox T have become the herbicides of choice, largely at the expense of Geigy's Atrazine. In this area of heavy soils, Randox performs consistently and effectively. Outside of this area, Randox has performed erratically.

Ramrod performs equally well in this important foxtail area; but also performs well on lighter soils where Randox has not been satisfactory.

SALES STRATEGY FOR 1966

With limited availability of material facing us in 1966, the excellent performance of Randox in the foxtail area and the fine performance of Ramrod outside the prime foxtail area, our strategy is to move into those areas where Randox does not perform in order to gain maximum penetration as rapidly as possible. Sufficient material will be alloted to the Randox area to supply MAC's and to pacify customers who are clamoring for Ramrod.

We will have a problem in restricting Ramrod within the Randox area where growers have had good Ramrod experience and are eager to make a change. This complicates our program and poses a practical problem in getting our message across to our distributors, who are only too willing to take the course of least resistance by selling Ramrod

within the prime Randox area where both products are well accepted.

Since our 1966 objective is also to sell maximum quantities of Randox, any sales of Ramrod within the Randox area, as shown on the map, may hurt our Randox sales efforts. Therefore, we will have to be assured that our customers, both wholesale and retail, devote their primary efforts to promoting Ramrod outside the Randox area.

All of this must be accomplished without detracting from our all out sales efforts on Randox and Randox T.

* * *

[26]

II. Competitive Products

A. Corn

In the Midwest market outside the Randox belt, Atrazine is *the* corn herbicide. We are outsold (on an acreage basis) 2 or 3:1 by Atrazine. Although Atrazine has some drawbacks, it still is the preferred corn herbicide of many farmers because of:

1. Outstanding weed and grass control on full season basis.

2. Strong state and influence group support.

3. Excellent corn tolerance.

4. Pre and post-emergence adaptation with liquid fertilizer.

5. Perennial grass control (quack grass in Wisconsin, Michigan, Minnesota and Illinois).

6. Superior performance at low rates on light soils.

7. Non-irritating to user.

8. Low cost—farmer can broadcast Atrazine at near band cost for competitive products.

Ramrod has these competitive advantages over Atrazine:

1. Superior grass control.

2. No soil residue problems.

3. Better customer support because of Geigy's pricing and distribution policies.

4. Multi-crop use—corn and soybeans.

5. Available in granular form.

B. Soybeans

Amiben is our strongest competitor in the soybean market followed by Treflan. Amiben offers the grower the following features:

1. Both grass and broadleaf control.

2. Easy to handle.

3. Performs on light or dark soils.

4. Works as liquid or granule.

5. Good experiment station and extension service support.

[27]

Ramrod has these competitive advantages over Amiben:

1. Lower cost per acre—$5.90 vs $3.30 for Ramrod.

2. Less phytotoxicity.

3. Less affected by rainfall.

4. Single rate for all soils

Treflan is our big competitor on soybeans and cotton in the Delta—less so in the Midwest. It offers the following points:

1. Good results under adverse weather conditions.

2. Full season control.

3. Wide range of broadleaf and grass control.
4. No irritation.

Advantages of Ramrod over Treflan:

1. Less likely to cause crop injury.
2. Better grass control.
3. No residue problem.
4. Available in granular form.
5. Same rate of application on all soil types.
6. No incorporation required.

PLAINTIFF'S EXHIBIT 136

MONSANTO'S CORN/SOYBEAN/SORGHUM
HERBICIDE-DISTRIBUTOR PRESENTATION
Dated September 5, 1968

* * *

[3]

For Monsanto's herbicide program in corn, the two principal products that Monsanto will be interested in for 1969 are Ramrod and a mixture of Ramrod and Atrazine.

In 1968, Ramrod performance was outstanding throughout the Midwest. In situations where dry conditions prevailed after planting, Ramrod was the only herbicide giving consistent grass and broadleaf weed control and still providing outstanding crop safety. This year, to confirm the results seen earlier, we conducted a wide range of rate studies from 4 to 6 pounds of active per acre, or 20 to 30 pounds of granules and 6 to 9 pounds of the wettable powder on a broadcast basis.

At the 5 pound rate and higher, we got outstanding smartweed control and improved broadleaf weed control over-all. Based upon this, we have taken steps to obtain clearances for a 6 pounds active (30 pounds of granules or 9 pounds of wettable powder broadcast basis) for use in 1969. We feel this additional clearance will allow the farmer to obtain broad spectrum weed control with absolutely no danger of crop carryover on the heaviest of soil types and high organic matter.

Ramrod still is the outstanding herbicide in terms of grass control, crop safety, and elimination of the hazards of soil carryover which plagued the whole Midwest in 1968.

It should be re-emphasized that Ramrod now has full clearances and tolerances established with no restrictions on silage corn or corn used for grazing.

* * *

[15]

<u>CHART 24</u> '69 COOPERATOR COMPENSATION PLAN

Comments:

This chart requires careful preparation since its a new approach and has been the center of attention for Distributors who have people and programs that can do us some good—and we will pay them for the good they do.

Read the purpose first. Bob Blackwelder prepared the following to help you.

> The purpose of the Cooperator Plan is to encourage promotion activities that will help get more Monsanto products sold and to compensate you directly for providing these promotion activities. We recognize that these activities are valuable to Monsanto and if performed properly, we are willing to pay for them. On the same hand, we don't want to pay people for these activities if they aren't doing them. We'll look upon the compensation derived from this plan as a part of your profit margin on these herbicide products.

[16]

> 1. We expect to provide your technical personnel with enough technical background on Monsanto products at the school so that he can easily answer questions that arise in his organization concerning these products. We want your men to be able to answer questions concerning our products as if they were being answered by a Monsanto technical man.
>
> This school will be conducted by Monsanto's Market Development Department in St. Louis during the last three weeks in October. This school will last about one and one-half days and at the end of school a quiz will be given to see if we have been able to get the information

across. The quiz will also tell us who needs extra help so that we can provide same.

Monsanto will pay motel and meal expenses while your men are in St. Louis. We will provide you with a form on which you may submit the names of the men you wish to attend this school. We expect that the men you send have as their primary job that of giving technical assistance to your sales personnel and their customers. We will pay you $500 for each man you send providing he passes the quiz and graduates from the school.

2. For each of your Reseller (Dealer) managers that you arrange to attend Monsanto's Reseller Herbicide Clinic, we will pay you $50, providing he stocks at least 24,000# of Monsanto products during the season.

For the manager of that outlet attending, we will pay $70. He will be paid $20 the day of the clinic, and he will receive an additional $50 upon verification of his first truckload of Monsanto products. We will encourage the reseller to send all his people to this school if he thinks they will benefit from it, but we will pay only $70 per reseller.

These clinics will be held during November in several areas of each state and will be taught by our district Market Development Supervisors. The Pesticide Program Supervisor for the region will be responsible for co-ordinating and conducting these clinics.

[17]

3. We will pay you $25 for each grower meeting that you organize with your reseller's outlets. Monsanto products must be given a minimum of one hour on the program. A minimum of 20 growers or 6,000 acres of corn and soybeans must be in attendance. Monsanto must be notified in advance of the grower meeting to enable Monsanto to aid in any way possible and possibly

to participate in the program if you desire and he can. Forms will be provided for you to submit as verification of the meeting. The reseller will be paid $50 to help cover the expenses of the meeeting.

4. You will be paid $500 for each Monsanto approved demonstration field in which at least two Monsanto herbicides are applied. Each of these herbicides must be applied to a minimum of one-fourth acre each and must be properly identified. Each field must be toured by at least 50 farmers to be eligible for payment. A limit of two fields will be eligible for payment. Monsanto Market Development Supervisor for the area must approve the field. He will help plan out these fields for you. A Monsanto representative must be on hand to assist you in conducting the tours.

5. We will pay you $200 for each additional tour of each of the approved fields that you conduct providing at least 50 farmers are present. There will be a limit of five paid tours per field. A Monsanto representative must be on hand at these tours to assist you in any way possible and to aid in answering questions.

Plaintiff's Exhibit 137

MONSANTO'S 1968-1969 MARKETING POLICY FOR CORN AND SOYBEANS HERBICIDES
Effective: September 1, 1968

* * *

[3]

I. OBJECTIVES

Ag Division's Objectives in this area are:

1. Push Ramrod on Corn

a. Increase our granular sales in present Ramrod G use areas and establish Ramrod G in other major corn areas where:

(1) Farmers have granular application equipment,

(2) Foxtail is prevalent,

(3) Crop rotation is practiced, and

(4) Atrazine damage or poor performance has been noted.

RAMROD GRANULAR SALES OBJECTIVE = 55$\overline{M}$ POUNDS.

b. Make a major penetration into the sprayable market with Ramrod 65WP, Ramrod-Atrazine tankmix, and Ramrod-Atrazine package mix.

RAMROD WP SALES OBJECTIVE = 7$\overline{M}$ POUNDS.

2. Push Lasso on Soybeans

a. Sell Lasso granules in all areas where farmers have granular application equipment and foxtail is prevalent.

LASSO GRANULAR SALES OBJECTIVE = 8$\overline{M}$ POUNDS.

b. Sell our entire Lasso EC supply.

LASSO EC SALES OBJECTIVE = 600M GALLONS.

c. Lasso G and EC must be pushed on soybeans and it must penetrate new geographic areas; primarily the Delta, Ohio, Indiana, Illinois, Iowa, Missouri, and Minnesota.

3. *Farmer Demand* for Monsanto herbicides must be created by Monsanto personnel in 1968-69. This is the Number One Job of all field marketing personnel.

4. *Monsanto Herbicides on Every Reseller's Shelf Early.* Must get on shelves where we haven't been before.

5. *Early Shipments* to Distributors and Resellers. *80% of shipments made by March 15, 1968.*

[4]

6. *Improved Communications* between all Monsanto personnel, customers (Distributors, Dealers, and Farmers), influence groups (University, Extension, Vo-Ag, Radio Farm Editors, Farm Press, etc.).

All Monsanto personnel must be telling the same story at all levels of sales to all levels of customers.

7. Cooperate with all Resellers and Distributors to see that Monsanto products move off the shelves they stock. It is not our intent to feud with a Distributor over a Reseller's shelf space, but to concentrate our efforts on demand creation and movement to farmers.

8. Treat 33% of treated corn acres in corn belt states.

50$\overline{\text{M}}$ acres of corn × 50% treated × 33% Monsanto = *8.3$\overline{\textit{M}}$ acres.* (1968 Corn Belt Survey shows Monsanto had 26% of treated corn acres.)

9. Treat 10% of treated soybean acres in U.S.

40$\overline{\text{M}}$ acres of soyeans × 55% treated × 10% Monsanto = 2.2$\overline{\text{M}}$ acres.

II. PRODUCTS COVERED

This policy applies only to the sale and distribution of the following corn and soybean herbicides:

Ramrod 20G	Lasso 10G
Ramrod 65WP	Lasso 4# EC
Ramrod-Atrazine Package Mix	Randox 20G
	Randox 4# EC
Roundup 20G	Randox T 35G
Roundup 65WP	Randox T EC
Wallop G	

Note: Certain of the above products have geographic and/or crop limitations which affect their sale and distribution. Monsanto personnel must be aware of these limitations and under no circumstances recommend or advise their use. If in doubt, clear with the marketing development man assigned to the specific area involved.

* * *

[7]

3. Distributor Appointment & Renewal

Distributorships will be approved by the Directors of Domestic Marketing and Agricultural Chemicals. Distributors will be notified of appointment by a one-year written contract (Formulated Pesticide Products Distributor Agreement) which will be sent by registered mail. The Agreement expiration date will be July 31, 1969. Properly executed agreements will be the responsibility of the Herbicide Product Manager. Communicating Distributor information to the field is also his responsibility.

The Distributor Agreement will spell out the state or states considered by Monsanto to be the Distributor's primary area of responsibility. These are the only states in which we will ship these products to Distributors. It must be understood that Monsanto cannot and will not stop the Distributors from selling into other geographic areas; however, one of the major points for measuring the performance of

each Distributor is the exploitation of markets in his primary areas assigned.

Distributorship contracts (Agreement) will be renewed from year to year depending upon Monsanto's need for Distributors and upon the Distributor's performance and capabilities, using the following criteria:

a. Financial and physical capability of handling large volumes of products in a short period of time. (Upwards of 300M pounds on a 20% granular equivalent basis, depending on the nature of the products and marketplace, during a 12-15 week period.)

b. Ability and performance in assisting Monsanto to solve special logistics problems. (Early take, warehousing, LTL trucking, in-season quick delivery.)

c. Supplying technically trained personnel to convey the Monsanto product messages to the Resellers and farmers.

d. Exploitation of the potential markets for Monsanto's products in the Distributor's assigned primary area of responsibility.

e. Cooperation shown in resolving end-of-season inventories.

f. Degree of participation in special advertising and promotion campaigns.

g. Reasonable growth from year to year (10-20% per year).

[8]

h. Assistance given Monsanto in pinning down specific product movements into Monsanto Salesmen's territories as an aid in monitoring Salesmen's performance.

PLAINTIFF'S EXHIBIT 139

MONSANTO'S CORN/SOYBEAN PRODUCT AREA BUSINESS PLAN 1970-1975 Date: September, 1970

* * *

[1]

I. INTRODUCTION.

The purpose of this document is to set forth a planning framework for day to day and year to year business decisions affecting Monsanto's domestic corn/soybean product mix.

This plan addresses itself to two major issues, or problems, in this market area.

A. To gain and maintain a significant market share in major crop areas.

B. To develop and preserve to the greatest degree possible a proprietary position, or franchise, in the market place.

There are obvious limitations on the capability to accurately forecast business activity five years hence. This is especially true in the area of agricultural chemicals where changing technology and governmental control are prevalent.

* * *

[4]

III. PROBLEM DEFINITION.

There are two key issues which will have a major effect on the conduct of the Agricultural Division's business in the corn/soybean herbicide market. The planning strategies set forth here are designed to deal with these issues.

A. Market Share.

The market for corn/soybean herbicides is rapidly nearing saturation as more and more farmers regularly

include them as a production input. At present, approximately 65% of all planted acreage is treated with pre-emergent herbicide. It is felt that market saturation will be reached when treated acres represent 75-80% of planted acres. Beyond this point any share of new business must come from competitive products and very likely at lower prices and higher promotion costs.

For this reason it is imperative that the Agricultural Division set specific market share goals for each market segment and then direct all resources toward economic attainment of these goals. The sooner a significant market share can be established, the easier it will be to sustain and the more difficult it will be for competition to subsequently attack.

B. Proprietorship.

The rapid growth of the corn/soybean pre-emergent herbicide market has been due in large part to the development of a few highly selective compounds. These compounds are the patented property of a handful of large companies marketing agricultural chemicals. The proprietary nature of these compounds and their varying levels of activity and selectivity has resulted in a relatively stable market with respect to price. Product vs. product competitive activity has focused primarily on performance aspects rather than price.

The first significant patents in this area expire in 1975. As expiration dates draw near, there will be increasing activity on the part of new companies wanting to enter the market. This will undoubtedly be done with carbon copy products offered at low prices.

The challenge to the Agricultural Division is to strengthen its market franchise and manufacturing position to the point where it can still command an important share of the market and maintain an attractive profit.

* * *

[28]

4. Premises relating to herbicide performance:

a. Lasso is the best grass control chemical on both corn and soybeans.

b. Atrazine is the best broadleaf component for corn.

c. Lasso combinations with atrazine (corn) and Lorox or dinitro (soybeans) corn are the best all-purpose herbicide mixtures.

d. The Lasso/amiben combination on soybeans has a high performance rating but is not likely to become a widespread application because of the high cost of amiben.

e. Special weed problems such as found in the Delta region will demand unusual treatment. Lasso may not be the best competitor in this area.

f. Neither Lasso nor Ramrod have practical utility as overtreatments although some product may be applied this way.

[29]

G. Competition.

1. Competition for the herbicide-treated acreage on corn and soybeans comes from a relatively few products manufactured and sold by large chemical companies.

a. J. R. Geigy has long enjoyed the major share of the corn market. See Figure 10, Page 36. The Geigy product mix is almost entirely based on triazine chemistry and is keyed largely to Aatrex brand of atrazine. The atrazine patent expires in June, 1976.

Atrazine is a highly effective broadleaf herbicide and is quite safe on corn. Its major weakness is its persistance and the fact that high use levels can create carry-

over problems which can damage other crops (such as soybeans) in rotation with corn.

Geigy's strategy has been to sell Aatrex to distributors and dealers alike relying on very strong farmer demand to pull the product through a somewhat disorganized sales distribution system. Sales coverage is excellent. A new form of atrazine, Aatrex 4L, was introduced in 1970. A Ciba-Geigy merger appears imminent.

b. Rohrer Amchem is the seller and patent holder of Amiben (Patent expires December, 1978). Amiben is made by GAF under contract to Rohrer Amchem.

Amiben has been the leading soybean herbicide. See Figure 11, Page 37. Its use has been primarily in the north-central states and very little Amiben is used on Delta soybeans. It can be characterized as a good, though not excellent, herbicide. It is effective on both some grasses and some broadleaf weeds but is not outstanding on anything. It is generally safe on soybeans although some stunting is recognized as an occasional problem.

Amchem has relied on strong academic support to develop Amiben sales. Distribution has been through typical distributor agreements. Amchem maintains effective sales coverage, but, historically, sales programs have not been particulary aggressive.

[30]

c. Elanco division of Eli Lilly produces Treflan. Major Treflan sales are divided between cotton and soybeans. Treflan is also cleared for and used in numerous other crops in smaller volume. Starting in 1965, Elanco has done an exceptionally fine job of promoting Treflan, first in the Delta, and more recently in the Midwest.

Treflan is primarily a grass killer and must be incorporated preplant in order to be effective. It is a low-

cost product at effective use rates because of its very high unit activity. (On light soils, rates are as low as one pint per acre—0.5 pounds of active ingredient broadcast.)

A potential weakness, in some areas, is the need for incorporation. Treflan also has very limited broadleaf activity. There is a small problem with carryover.

Elanco has used imaginative promotion and programs to sell Treflan in the face of reluctant academic support. Initially fair traded, Treflan is now sold to both distributors and dealers. The Treflan patent expires June, 1983.

d. DuPont sells linuron under the trade name, Lorox. It is a substituted urea of a family similar to other DuPont herbicides. It is made by DuPont under exclusive license from Hoechst whose patent expires February, 1980.

Lorox is effective against some grasses and broadleaf weeds. Its strength tends to be more against the broadleafs. It is marginal in safety especially on light soils. Lorox has a high rate sensitivity to organic matter and high rates needed on high organic soils are uneconomic. Lorox can be used on both soybeans and corn, however safety on corn is so marginal that current recommendations specify use in mixtures with atrazine only.

DuPont fair trades Lorox. Sales are through a limited distributor network. Sales growth has been steady but not spectacular. (Figure 11.) Recent studies indicate that DuPont hopes to expand the sales of linuron through use in packaged mixtures such as dacthal-linuron, and amiben-linuron.

[31]

e. Stauffer introduced Sutan in 1969. It is a product of the carbamate family. The patent expires November, 1976.

Sutan is a grass killer with a control spectrum similar to Lasso. However, it must be incorporated preplant. The major weakness in its use seems to be a result of non-uniform incorporation techniques.

Stauffer fair trades Sutan. Promotion has been aggressive, however, field sales strength has not been adequate to obtain a highly significant market penetration.

f. New products which are of potential significance are:

(1) Shell-Bladex—A new triazine for use on corn. Shell has been marketing Planavin in the Delta as a poor runner-up to Treflan. They are likely to end up in the same role in the Midwest with Bladex vs. Aatrex. A potential strength for Bladex which must be considered is that it is reported not to have as serious a carryover problem as atrazine.

(2) BASF-Basamaize—An analog of Ramrod which BASF could move into the Midwest as a grass killer in competition with Lasso and Ramrod. BASF marketing capabilities in the United States are untested.

(3) Chemagro-Bay 94337—A potential new soybean herbicide with outstanding broadleaf control. It has marginal safety. It could be effectively marketed by Chemagro's existing sales organization in the Delta.

* * *

[33]

f. The cost of introducing a new product into this consumer market will discourage lesser companies than Shell, BASF, and Chemagro from entering.

Smaller competitors will probably seek ways to market through private labeling a product for the larger farm supply cooperatives. Efforts in this area will increase as patents expire on the major products discussed here.

3. In the preparation of this report consideration was given to the possibility of trading or selling Ramrod and/or Lasso technical to a number of competitors.

In consideration of this possibility, the following premises have been influential in determining the preferred course of action:

a. Following propachlor patent expiration in 1975, a strong proprietary position with alachlor will be of value as opposed to facing wide-spread use of propachlor and subsequent pricing pressures.

Conclusion: Phase out Ramrod; push Lasso.

b. Monsanto's strength over the long term is grass control. While this will not be an exclusive strong point (Sutan, Basamaize) it is one feature that Monsanto can dominate and capitalize on.

Conclusion: Lasso is the best product available for all-around grass control and should be pushed into the market as quickly as possible.

c. Broadspectrum weed control can be obtained in all crops in spray through the use of herbicide mixtures.

Conclusion: Tank mixing will increase and Lasso will be emphasized as the universal grass component for tank mixes.

d. Monsanto can, and should, continue to dominate the market for granular herbicides on corn in spite of potential competition from Basamaize and mixtures.

Conclusion: Clear and sell Lasso/atrazine granules as soon as possible.

* * *

[41]

I. Pricing.

1. The wide variability of performance between herbicides, coupled with the fact that all major herbicides are proprietary with a single producer-seller has resulted in a high degree of price stability at the manufacturer's level. Some price performance relationships exist between Lasso 10G and Amiben 10G.

2. Present broadcast applied product costs of about $5 per acre provide adequate return to be of interest to the farmer. These prices have held steady or decreased slightly over recent years. At the same time that product costs have been steady, the corn grower has spent more money per acre for weed control as he has switched from 2,4-D post treatment to the more expensive pre-emergent herbicides. See Figure 12, Page 42.

3. Price margins between farmer-dealer and dealer-distributor have not generally followed the manufacturer's recommendations. These margins are responsive to supply-demand relationships and depend also on the individual manufacturer's distribution philosophy. Stauffer, DuPont, and Elanco have sold on a Fair Trade policy. Elanco dropped Fair Trade in about 1968. Typically, both distributor and dealer seem willing to operate on a margin of about 10%. Typical margins and cost relationships are shown in Table 8, Page 43.

4. Premises relating to pricing.

a. Beginning in 1972-1973, various strategies will be put into effect by manufacturers facing a loss of proprietary status (patent expiration). Monsanto will be one of these. The strategy will be directed toward gradually reducing margins to the point where product manufacturing and promotion costs will deter all but the most aggressive competitors from entering the market with similar products. A further discussion of Monsanto pricing strategies begins on Page 77.

b. A "price war", as such, will not occur between manufacturers prior to 1975 because producers will become dependent upon one another and product mixtures. Rather than a "price war" there will be a general industry price adjustment to bring margins in line with a typical technical commodity. (e.g. aerosol propellants).

* * *

[44]

c. In order to forestall competition from offering technical product or formulation to co-ops and other major farm supply organizations, some producers (Stauffer, Amchem, Geigy) may consider private label production prior to patent expiration. It is considered unlikely that any move will be made in this direction prior to 1975.

d. Some inter-product price adjustments may occur. For instance, a reduction in Lasso granules to make them competitive with Ramrod granules could possibly bring about a similar reduction in Amiben granules. Also, continued penetration by Treflan into the heavy soil soybean areas may justify a reduction in Lasso EC prices.

PLAINTIFF'S EXHIBIT 196

MONSANTO COMPANY
3158 Des Plaines Avenue
Des Plaines, Illinois 60018
Chicago (312) 774-7400
Des Plaines (312) 296-6688
October 31, 1967

Re-issued do to error
10-30-67, see change
in quantity pages 2 & 3

Sprayrite Service Corporation
10216 North Second Street
Rockford, Illinois 61111

Gentlemen:

Monsanto Company is pleased to announce that Sprayrite Service Corporation has met the qualifications for appointment as a Formulated Pesticide Product(s) Distributor and encloses for your signature and execution a new Distributor Agreement.

Before executing the enclosed Distributor Agreement, please note the following:

1. The Agreement cancels and supersedes all existing agreements covering the distribution and sale of all products listed as Goods.

2. The Agreement defines your area of primary responsibility for distribution of Monsanto's Goods.

3. The Agreement is effective September 1, 1967 and terminates August 31, 1968. It is not an Evergreen Agreement.

In future annual reviews to determine the qualification for appointment of Formulated Pesticide Product(s) Distributors, Monsanto will use a number of criteria to evaluate each Distributor, including:

1. Is the Distributor's primary activity the solicitation and distribution of agricultural chemical products to *dealers*?

2. Is the Distributor capable of financing, warehousing and distributing large quantities of Monsanto formulated pesticide products in a short period of time?

3. Is the Distributor willing and capable of assisting Monsanto in solving special logistics problems?

4. Is the Distributor willing and capable of carrying out Monsanto's technical programs at both the Dealer and Farmer levels with properly trained technical personnel?

5. Can the Distributor be expected to show reasonable growth from year to year? (10-20% per year)

6. Can the Distributor be expected to exploit fully the potential markets for the Goods in the Distributor's area of primary responsibility?

In addition to the criteria applying to the evaluation qualifications and appointment of a Distributor to sell Monsanto Formulated Pesticide Product(s), supplemental criteria are considered for a specific product or products. During the term of the enclosed Agreement, Monsanto expects all of its Midwest Area distributors of Randox and Randox T (liquid and granular), and Ramrod (granular or wettable powder) to attain or exceed both of the following minimums:

1. Purchase a minimum of 750,000 pounds of 20% granular equivalent.

2. Exceed 1967 purchases of these products by ten percent (10%) on a 20% granular equvalent basis.

In computing 20% granular equivalent volume, the following conversion table is used:

ONE POUND OF	20% GRANULAR EQUIVALENT
Randox G, Randox T G, Ramrod G	1 lb.
Randox L, Randox T L	20 lbs.
Ramrod W. P.	3.25 lbs.

In order to assist you, we have calculated your 1967 granular equivalent base.

	1967 NET PURCHASES	POUNDS OF 20% GRANULAR EQUIVALENT
Randox L	2,000 gals.	40,000 lbs.
Randox G	486,000 lbs.	486,000 lbs.
Randox T L	0 gals.	0 lbs.
Randox T G	26,000 lbs.	26,000 lbs.
Ramrod W. P.	80,000 lbs.	260,000 lbs.
Ramrod G	680,000 lbs.	680,000 lbs.
	TOTAL	1,492,000 lbs. Granular Equivalent Base

Monsanto's 1968 minimum goal for Sprayrite Service Corporation is *1,641,200 lbs.* (1,492,000 + (10% × 1,492,000).

Also enclosed is the Randox, Randox T, and Ramrod Distributor Price and Policy for the Midwest Area.

Please review carefully the contents of this letter, as well as the enclosed Distributor Agreement, and Distributor Price and Policy and note the important price and policy changes which have been made in this product line.

If you desire to be our Distributor, please sign and return the original and all copies of the Distributor Agreement in the enclosed envelope within ten (10) days of receipt. We will then execute the Agreement and return a copy to you.

Sincerely,

Donald R. Fischer
Product Sales Director

DRF/js
Encls.

/s/ William R. Bone
William R. Bone
District Manager

Confirmed
/s/ Don Yapp Pres.
Don Yapp

PLAINTIFF'S EXHIBIT 202

From the desk of
WILLIAM R. BONE

To Don Yagga

MONSANTO COMPANY

AGRICULTURAL DIVISION

68 season

800 No. Lindbergh Boulevard
St. Louis, Missouri 63168
(314) OXford 4-1000

Effective Date: 11/27/67
Supersedes Date: New Issue

FORMULATED PESTICIDE PRODUCTS (FPP) DEALER PRICE AND POLICY MIDWEST AREA

Pertains to Monsanto Formulated Pesticide Products (FPP) Dealers who have been appointed for the 1968 season to serve Monsanto needs in the Midwest area.

MIDWEST AREA includes the following Monsanto Sales Districts: Fremont, Des Moines, Chicago, St. Louis, Indianapolis and Cincinnati (see attached map).

I. *TERMS:* 3% cash discount if paid by the 20th of the month following date of shipment. *Net* due 20th of the second month following date of shipment. 3/4 of 1% service charge will be applied to past due balances.

II. *PRICE:* ($/lb. or $/gal.) Delivered by common carrier to dealer destination, single shipment, or F.O.B. designated Monsanto warehouse. Minimum order 1,000 lbs. (1 gallon of liquid weighs 10 lbs.). See Page 4 for discounts on the following products.

	FORMULATION	PACKAGE SIZE	BASE DEALER PRICE	SUGGESTED RETAIL PRICE
Avadex	4# DDTC/gal.	5 gal. can	13.30	14.30
Avadex Gr.	10% DDTC	50 lb. bag	.37	.40
Avadex SW	NOT SOLD			
Far-Go	4# TDTC/gal.	5 gal. can	13.00	14.00
Lambase	NOT SOLD			
Niran M-4	4# methyl parathion/gal.	5 gal. can	PRICE AVAILABLE BY MARCH 1, 1968	

	FORMULATION	PACKAGE SIZE	BASE DEALER PRICE	SUGGESTED RETAIL PRICE
Niran 6-3	6# ethyl and 3# methyl parathion per gal.	55 gal. drum	8.10	11.05
		5 gal. can	8.35	11.35
		1 gal. can	9.05	12.00
Niran 10-G	10% ehtyl parathion granules	50 lb. bag	.14	.16
Niran 10-10	10% ethyl parathion and 10% aldrin	50 lb. bag	.25	.23
Ramrod Gr.	20% gran.	50 lb. bag	.50	.54
Ramrod WP	65% WP	50 lb. bag	1.62	1.75
Randox Liq.	4# CDAA/gal.	5 gal. can	8.80	9.40
Randox Gran.	20% CDAA	50 lb. bag	.47	.50
Randox T Liquid*	3.1# CDAA 7.3# TCBC/gal.	5 gal. can	10.60	11.20
Randox T Granular*	11.7% CDAA 23.3% TCDC	50 lb. bag	.47	.50
Eagac	- - - - - - - - NOT SOLD - - - - - - - -			
Vegadex Liquid	4# CDEC/gal. Liquid	30 gal. drum	10.10	12.25
		5 gal. can	10.45	12.60
		1 gal. jugs (4/case)	11.00	13.20
Vegedex Granular	20% CDEC Granule	50 lb. bag	.55	.64
Wallop Granular	8.3% Ramrod and 10% ethyl parathion	50 lb. bag	.36	.39

* Geographic Product Availability—Randox T Granules and Randox T Liquid are cleared for sale and are available in the following MIDWEST AREA states: Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, Ohio, South Dakota and Wisconsin.

PLAINTIFF'S EXHIBIT 233

ASSOCIATED PRODUCERS, INC.
29 E. Indiana Avenue
Saint Paul, Minnesota 55107
Phone: 222-1868

1 October, 1968

TODAY IN AGRIBUSINESS

Just a lot of people are shaken, but good. This new sensation may persist for some time, affecting some of course much more than others. The biggest headache is uncontrolled overproduction. This has frequently come from long-time large scale mismanagement, with too many of the "bigs" wanting to be still bigger and getting on every "bandwagon" that came in sight. Most of my customers would say, it would not be so bad if the effect of their battling could be limited to just the "bigs", but there just isn't a chance. The reaction is soon spread like the dropping of a boulder from great height into the center of a small lake, causing a huge disruptive wavelike action on the entire shoreline.

Since farmers and other business men connected with agriculture in numerous ways cannot avoid these adverse reactions, the only practical course for most is to "steer the course—stay with the ship" and determine to use all possible ingenuity and sane effort to outride the storm.

Some are already recognizing that in order to facilitate the accomplishment of this objective different approaches or policies than those of the recent past are a *must*. One such firm is Monsanto Co., at least as to the sales management procedures being applied to their agricultural chemicals (herbicides and insecticides). Most of our customers were disenchanted by the obviously intolerable developments during the past couple of years, not only with Monsanto's products as merchandise, but with others as well.

Monsanto, now recognizing the absolute necessity of getting the "market place in order" with regard to their entire

line of agriculture chemicals, is determined to do what it takes to rectify the situation from now on. In other words, Monsanto's 1969 program is aimed at regaining distributor and dealer confidence through more attentive management. They have too much at stake to permit "drift" or any lack of able management to deter the regaining of their proper stature in the eyes of the trade.

Because Associated Producers, Inc. will again be a distributor for Monsanto and because we have been given the program story as available to date, we feel it is to the competitive advantage of our dealer customers to understand the planned program as much and as soon as possible. In brief, it includes the following plus the details as to price and terms, *including rebilling of up to 25% of carryover on early orders* as set out in the enclosed. First of all, the Monsanto retail fertilizer plants scattered around the country *will not* in any case sell to retail dealers. Secondly, while the number of *jobbers is cut to about 1/3* of the number active last year, and while Monsanto representatives may take dealer orders if distributors are not actively servicing a potential retail market, every effort will be made to maintain a minimum market price level.

In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons. So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. Also, as far as the national accounts are concerned, they are sure to recognize the desirability of retaining Monsanto's favor on a continuing basis by respecting the wisdom of participating in the suggested program in a manner assuring order on the retail level "playground" throughout the entire country. It is elementary that har-

mony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final.

Besides the above comforting concepts Monsanto offers, through their expanded personnel in the field, every reasonable effort to very much more extensively than ever before enhance enlightened demand on the part of your customers for a preferance for Monsanto's ever-expanding assortment of more dependable yet less expensive weed and insect control methods, techniques and products.

Yes, Monsanto has the capacity to make things happen, and I have been assured that they are going to do so constructively from your and my standpoint. The following are examples of what is available to you, in addition to new, more effective products and ideas for their use, more extensive advertising at the local, regional and national level by all practical media,—

1. These Monsanto fieldmen are to help you and us by creating more helpful influence through vo-ag teachers, county agents, bankers and others.

2. They will also aid in supervising and encouraging local compara-time product test plots.

3. Monsanto will sponsor herbicide clinics throughout your market area for yourself and employees. Since attending these clinics will take time away from your business, Monsanto will pay each manager in attendance a minimum of $20.00 at the close of the day's clinic plus an additional $50.00 after delivery of your first truckload of assorted Monsanto products. The way the program sounds to me the growth in farmer interest in Monsanto products will make it possible to greatly increase the number of truckload buyers. An example is the fact that a minimum 24,000 lb. truckload of Ramrod granules is just enough to take care of the requirements of 48 fifty acre corn customers. In due time interested dealers will be notififed of the location and dates of the

clinics. Everyone who attends a Monsanto herbicide clinic will receive a diploma certifying his graduation.

4. We, together with Monsanto representatives and yourself, will also sponsor grower meetings. For each of these in which you participate you will be paid the sum of $50.00 by Monsanto, assuming:

a. A minimum of one-half hour is devoted to the promotion of Monsanto products to a minimum of 20 growers or producers of 6,000 acres of corn and soybeans be present at the meeting.

b. The dealer and/or our representative presenting the meeting will have had to be a Monsanto clinic graduate.

c. A list of growers by name, address, and approximate acreage of corn and soybeans planned for the upcoming year will be required. A form or cards for reporting this information will be provided.

5. Each distributor is allowed but a limited number of these grower meetings, all of which will be held during the winter and early spring. Of course, choice as to dates for your meeting will be subject to a first come first choice basis. The sooner we know your preference as to the time you would like a meeting held for you, the better. At these meetings other than Monsanto products may be discussed also, but it will be good business to think in terms of allowing Monsanto a top exposure. Monsanto will furnish invitation cards, ad mats for local publicity, and meeting registration cards. The presentation material, slide scripts, and banners too will be furnished by Monsanto on request.

Monsanto is not entering into this very attractive and expensive program without the idea that it will create more profit for themselves as well as for those of us who participate in behalf of making the entire program work. They are thinking about the long term, and I am sure you and I prefer such a viewpoint as to our own customer relations also.

Monsanto has changed for the better in a big way, so let us participate together in '69. The enclosed card is for your convenience in getting preferred attention as to the date of your grower meeting.

Sincerely yours,

/s/ FRED H. BAILEY

Fred H. Bailey

P.S. Besides making available at no cost a supply of pertinent product mailers and other sales help materials, Monsanto will pay the total cost of local ads based on verification of same, up to an amount equal to the equivalent of 50¢ per cwt. lbs. of granular product purchased. Thus, on 200 50 lb. bags you could spend up to $50.00 for local advertising at Monsanto's expense. This can be for either *radio* or *newspaper* advertising with Monsanto furnishing the mats or script.

PLAINTIFF'S EXHIBIT 279

MONSANTO

FROM:	Tom Dille
LOCATION:	Muscatine
DATE:	August 7, 1969
SUBJECT:	PROSPECTIVE DISTRIBUTOR REVIEW
Reference:	Cole Chemical Supply Company
To:	Messrs. R. M. Schweikher R. E. Baynard A. F. Davis R. E. Blackwelder

The attached questionnaire is to serve as my introduction of Cole Chemical Supply Company of Rockford, Illinois into consideration for appointment as a Monsanto distributor for 1970.

Cole Chemical is primarily an agricultural chemicals marketing organization. There are actually three parts to this organization; agricultural pesticides, chemical application equipment, and animal health products and supplies. There are three districts, each with a district manager, sales force, warehouse and office. Each district handles products for all sections of the business; that is, they sell pesticides, equipment, and animal health products and supplies. One exception to this is the Springfield district which is handling only pesticides and equipment. The three districts break out basically as Wisconsin, northern Illinois and southern Illinois.

Jim Sheldon, the president, has set up the business to stay and grow over a long range period of time. They are not in the business as a short term venture. They are studying and analyzing the market in which they operate and then designing a marketing plan that will supply and satisfy that particular market.

They have about 700 retail outlets in which they have a significant influence in Illinois and Wisconsin. The personnel is some of the better technically-trained people in this field. This would give them the ability to do a fine job in exploiting the market potential for Monsanto products.

With their business based on service and the ideally located warehouses, they would be able to help in solving Monsanto's logistics problems both in early take and the LTL in-season shipments.

They would be anxious to participate in the advertising and promotional programs as they do a great deal of this at present as part of the services they offer their resellers.

They recognize that in their market place they must have Monsanto products to properly service their accounts. They sold our products as a distributor this year more because they had to in order to be a complete distributor of corn and soybean herbicides.

There is some question as to the financial strength of the organization, but Mr. Sheldon has expressed his willingness to meet and work with our credit department in whatever manner would be necessary.

Cole Chemicals strength is primarily in northern Illinois and Wisconsin. My greatest need is in northern Illinois, where we missed some sales this year because there was no product on the shelves. They could help in strengthening the distribution in this market without an adverse effect on our other distributors.

In Wisconsin Cole is very strong and at the same time our distribution there is relatively strong with Hopkins and E-Z Flo. However, I believe with the growth potential in the state and our expansion of the market area, Cole can help us attain our goals without disruption of our presently established system.

I recommend that if Cole Chemical Supply Company meets the criteria for selecting distributors they be appointed as a distributor in 1970.

/s/ TOM DILLE
Tom Dille

/kn
attachment

cc: D. E. Seitz
R. G. Wilson

PLAINTIFF'S EXHIBIT 309

1970 CORN/SOYBEAN HERBICIDES DISTRIBUTOR/DEALER MARGINS

FARM USE COSTS

Distrib. Unit Cost All Disc.	Product	Silt Loam 3% Rate	Distrib. Price Per Acre/All Discounts	Distrib. Margin at Suggest Dealer	Distrib. Margin at Average Dealer	Acre Distrib. Gross Profit at Avg. Dealer	Average Dealer Price/Acre	Dealer Margin at Suggest Retail	Dealer Margin at Average Retail	Dealer Gross Profit at Average Retail	Farmer Price/Acre Suggest List	Farmer Price/Acre Average	Distrib. Dealer Profits at Avg. Prices	Dist./Dealer % G.P. to Acre Farm Price
	CORN HERBICIDES													
1.83	Aatrex 80W	(2.5 Lbs.)	4.60	25.1%	6.2%	0.30	4.90	34 %	2.5%	0.125	7.12	5.00	0.425	6 %
6.98	Sutan 6E	(2/3 G)	4.66	20.5%	20.5%	1.32	5.98	11.5%	11.5%	0.79	6.77	6.77	2.11	31 %
.717	Sutan/atrazine........	(11 Lbs.)	7.85	17.6%	17.6%	1.65	9.50	13.0%	13.0%	1.50	11.00	11.00	3.15	34 %
.234	Knoxweed G	(20 Lbs.)	4.68	20.5%	20.5%	1.12	5.80	11.9%	11.9%	.90	6.70	6.70	2.02	14 %
1.206	Londax	(8 Lbs.)	9.65	21.0%	21.0%	2.55	12.20	12.0%	12.0%	1.70	13.90	13.90	4.25	30.5%
10.33	Lasso EC	(2.5 Qt.)	6.45	14.0%	12.0%	.90	7.35	13.0%	9.7%	.80	8.45	8.15	1.70	21 %
.40	Lasso 10G..........	(25 Lbs.)	10.00	15.2%	12.0%	1.20	11.20	15.0%	10.5%	1.30	13.25	12.50	2.53	19 %
1.01	Ramrod 65WP	(8 Lbs.)	8.08	14.6%	12.0%	1.16	9.20	15.5%	8.0%	1.70	10.90	10.00	2.86	28 %
.38	Ramrod Gran	(25 Lbs.)	9.50	13.8%	7.5%	.75	10.25	17.0%	8.4%	.90	12.35	11.20	1.65	14.5%
1.22	Ramrod/Atrax.	(7 Lbs.)	8.55	14.0%	9.5%	.90	9.45	15.5%	10.0%	1.05	11.20	10.50	1.95	18.6%
.26	Randox T G	(30 Lbs.)	7.80	16.0%	10.4%	.90	8.70	19.5%	12.0%	1.20	10.80	9.90	2.10	21.0%
	SOYBEAN HERBICIDES													
10.385	Amiben G	(25 Lbs.)	9.65	18.0%	10.5%	1.10	10.75	18.0%	8.0%	0.95	13.10	11.70	2.05	17.5%
6.78	Amiben L	(1¼ G)	8.45	19.5%	15.5%	1.35	10.00	14.0%	10.5%	1.20	11.60	11.20	2.55	22.7%
19.68	Treflan L	(¾ Qt.)	3.68	20.5%	5.1%	0.19	3.87	24.5%	6.0%	0.25	5.12	4.12	0.44	8.6%
11.85	Vernam 6E	(5/12 G)	4.92	25.0%	25 %	1.62	6.55	12 %	12.0%	9.90	7.45	7.45	2.52	34.2%
.274	Vernam G	(25 Lbs.)	9.35	24.5%	24.5%	3.05	12.40	11.5%	11.5%	1.60	14.00	14.00	4.65	33.2%
10.33	Lasso 4 EC	(2½ Qt.)	6.45	14.0%	10.5%	0.75	7.20	14.8%	11.5%	0.95	8.45	8.15	1.70	20.9%
.40	Lasso Gran	(25 Lbs.)	10.00	16.0%	13.0%	1.50	11.50	13.0%	8.0%	1.00	13.25	12.50	2.50	20.0%
1.976	Lorox	(3 Lbs.)	5.95	22.0%	22.0%	1.70	7.65	13.5%	13.5%	1.20	8.85	8.85	2.90	32.5%

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COMPARISON OF 1970 COMPETITION PRICE INCENTIVE PROGRAMS

Company	E. O. Discount Period	E. O. Discount	Quantity Requirement	Quantity Discount	Terms Discount	Special Other Discounts or Offers	Total Possible Discount	Margin Suggest Resell on Dist. Only	Margin Suggest Resell All	Credit Split	Ship Date Requirement	Invoice Date	Payment Date
Geigy	Prior 9-30 To 12-15	4% 2%	None	2.5% on 50,000 pounds	1.2% Mo. up to 6%	None	12.2%	14.2% Maximum	25% Maximum	20%	4th Quarter January Seller option	With order Ship	⅓ May 20 ⅓ June 20 ⅓ July 20
Amchem ...	10-1 2-28	6% (2% Mo. Oct. to Dec.) (Dec.—1.2%/Jan .3%)	None	2% on 24,000 pounds TL	2.9% March 1	Bonus 1% to 2% and Inv. Insure to Jan. 1	11.5% to 12.5%	9%	18.4% to 20.4%	15%	None except storage allowance variable	With order dated 4-1	Net 5-1
Stauffer	Prior Feb. 1	7%	None	4.2% on 24,000 pounds	5% April 20	None	11.0%	11%	20.5%	None	Seller Option between Jan. 1-March 1	With order Ship	April 20 or Net 31 after 4-1
[illegible]	10-15 to 2-27	6% after Quantity Discount	None	2% on 24,000 pounds	2%-45 dys. form 1st Mo. following delivery	2% or more on formula 8 active ingred.	12.0% or more	13.5%	20%	25%	Seller Option and whse. location	With order Ship	60 days after 1st Mo. follow delivery
Monsanto ..	1-1 to 2-28	2.4% in Jan.—1.2% in Feb.	T/L only (24,000)	.9%	3% March 10	Distributor Program value .25%	7.0%	7.5%	14%	25%	1-1 to 1-31 2-1 to 2-28	With order Ship	May 20
DuPont	1-1 to 2-28	See Terms	None	4.5%	3.0%—10 dys	None	8.0%	16.0%	22.5%	20%	1-1 to 1-[illegible] 1-[illegible] to 2-[illegible] 2-[illegible] to 3-[illegible]	With order Ship	May 20

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1970 Distributor Maximum Discount NET GROSS PROFITABILITY COMPARISON

	MINUS COSTS							PLUS COSTS				NET		
Purchase Basis $20,000 before any Growers	Maximum E.O. Discount	Maximum Quantity Discount	Maximum Terms Discount	Other Special Discounts	Distributor Gross Profit At Sug. Resale	Total Gross DC	Percent to Dollars	To May 30 1% per Month Prepay	To April 30 1% per Month Warehouse	10% for Carry over Inventory Beyond Cred. Rebill 25%	Total Gross PC	Percent to Dollars	Net Gross Profit	Percent to Dollars
Geigy	800	100	1200	0	2840	4940	24.9%	1000	1400	100	2500	12.5%	2440	12.0%
Amchem...	1200	400	580	300	1800	4280	21.2%	600	1400	200	2200	11.0%	2080	10.0%
Stauffer ...	1400	840	1000	0	2200	5440	27.2%	200	800	500	1300	6.5%	4080	20.1%
Elanco	1180	480	400	400	2720	6100	25.4%	400	200	0	600	3.0%	4600	22.9%
Monsanto ..	480	180	600	190*	1500	2980	14.7%	480	600	0	1080	5.3%	1870	9.4%
DuPont ...	—	980	750	—	3100	4750	23.7%	800	670	0	1470	7.4%	3280	16.4%

*Based upon average Distribution compensation percent volume.

PLAINTIFF'S EXHIBIT 325

MONSANTO

FROM: Tom Dille
LOCATION: Muscatine
DATE: November 16, 1970
SUBJECT: Distributor Marketing Presentation W. R. GRACE—Henry

TO: Jack Zorn
R. E. Blackwelder
R. M. Schweikher
John Mathias

cc: D. E. Seitz
J. E. Triplett
R. Robinson
M. A. Flynn
R. W. Fulwider
G. E. Uecker
P. G. Sykes
R. L. Leach
W. R. Grace file

The presentation of our 1971 Marketing Program was made to E. Graham Chandler, the Pesticide Products Manager for the Henry Region of W. R. Grace.

Presentation was well received and Mr. Chandler indicated he would comply with the requests we made. He will again handle all orders for this region and, along with the Regional Manager, Mr. Ben Anderson, maintain pricing control on pesticides at this level.

A date was set with the Henry District for presentation of the Distributor Marketing School for December 10th for all Territory Managers, their district managers and sales managers. Bob Blackwelder will be doing the same with the Decatur District. His contact man will be Herb Bichnell in the Decatur office.

They are sending out a letter announcing the dealer marketing schools in Illinois and asking all their outlets to attend. Copy of letter will be sent to this office.

The other information we have requested under the marketing strategy section of our program will be ready when we hold the marketing school.

Attached are copies of the organization of the Henry and Decatur districts. I will obtain the regional organization chart

at a future date, or maybe Jack Zorn already has same and could forward a copy to me.

/s/ TOM

Tom Dille

/kn

PLAINTIFF'S EXHIBIT 344

Robert R. Lane—Kansas City District Office

April 8, 1971

Pricing and Distributor Candidates

All Salesmen

PLEASE READ AND DESTROY

Per our recent District sales meeting, as a reminder, I urge all of you to be aware of the legal implications of getting involved on the subject of prices. We can only go so far and do only so much. The key to success is simply the people involved *must* talk to each other, not us.

If pricing problems develop, listen and get all the details. Bring the problem to my attention, but make no promises, boasts, etc. to dealer or Distributor salesman.

If someone asks for Distributorship in "72" avoid subject of requirements, policy, etc. Simply refer candidate to me. I will talk to the candidates. Please no promises like "I'll see what I can do" etc.

Robert R. Lane

RRL/cc

AGAIN, PLEASE DESTROY ONCE YOU UNDERSTAND THE CONTENT OF THIS MEMO.

PLAINTIFF'S EXHIBIT 348

MONSANTO

[1]

FROM: D. E. Seitz

LOCATION: St. Louis General Offices

DATE: April 28, 1971

SUBJECT: Summary of April Meeting

cc: Messrs. D. R. Fischer
R. M. Schweikher
J. P. Mathias
V. T. Robinson
J. A. Ross

TO: Messrs. M. S. Albertson
R. E. Blackwelder
T. M. Dille
E. E. Jordan
R. R. Lane
N. A. Sinclair

Following is an outline of the various subjects discussed at our recent meeting, April 26 and 27. I have noted all of the agreed-to dates, conclusions, and future action for the topics covered.

* * *

[3]

VI. Reseller and Distributor Compensation

A. Reseller Compensation—The order the dealer file folders will be processed this year for payment is as follows:

1. Each salesman will have a file folder completed for each dealer participating in our program with all respective parts verified and turned into the District Office by September 1, 1971.

All salesmen must write their territory number on the advertising participation form sent in with the ver-

ification of advertising. Neale Sinclair agreed to send the cover sheet he used last year to all District Managers for their possible use.

2. D. E. Seitz will provide a log sheet to keep dealer program compensation records by salesman by district. These log sheets will be available by June 1, 1971.

3. The completed log sheets will be sent to D. Seitz by September 15, 1971 for checks to be issued.

4. Hopefully, the checks for each dealer outlet will be returned to the salesman through the District Managers for personal delivery to each dealer.

It was suggested that the Merchandising Supervisor write a letter to all retail outlets of national accounts and tell each outlet how many dollars he earned in our Dealer Marketing Program and for what function.

B. Distributor Compensation—We agreed to begin handling each distributor's advertising allowance as quickly as possible which would be July 1, 1971 at the latest. The following things will be required of each distributor:

1. Proof of performance (affidavits, tear sheets, etc.)

2. Paid invoices for their advertising.

3. Where applicable, a copy of the dealer's (name and location) signed release permitting the distributor to spend his advertising dollars.

4. Salesmen will then be notified of results to assure this part of the program is completed and the distributor is not over paid and we do not pay on the same thing twice.

[4]

VI. Reseller and Distributor Compensation (continued)

B. Distributor Compensation (continued)

The distributors who have signed releases from dealer outlets are: Felco, Cole/Hopkins, Farmland, MFA Oil, Seedkem, Sur-Gro, and Harris-Serum.

The actual payment procedure to be followed for distributor program participation and advertising will be for the account manager to personally deliver the checks to the proper person in each distributorship.

* * *

[5]

XV. Sales Territories

R.M. Schweikher will further discuss this subject individually with each district manager. One piece of information to use on this subject is the individual territory data taken from our Dealer Census. This is all the information we have and we need to see exactly what conglomeration of information we can come up with for each sales territory.

[6]

One of the questions is also whether we really have our people today properly placed in relation to the present market and future potential.

XVI. 1971 Distributor Review Guide

We will use the points covered on this guide to decide on the geographic limitations of present distributors and also to evaluate present and suggested future distributors.

It was agreed that any changes or recommended changes in our distribution system has to be committed to paper with all specifics stated in concise terms for review by our lawyers before anything can be finalized.

All questions to be asked of our present distributors must be taken from all district managers in July so the account manager can get all the questions answered at the distributor review.

XVI. 1971 Distributor Review Guide (continued)

All distributors are to give their sales information (Part II of Program) to the account manager at the time of the review (August 1, 1971).

A list of concerns were formulated to answer on distributor appointments as follows:

Distributor	District Manager	Issue
1. Am. Oil	REB	—Non-support of distr. program
	REB & EEJ	—In-season logistics
	MSA	—Other sales (Minn.)
		—Use chemicals as a lost leader for petroleum products
	TMD	—Price administration (floor price)
2. Am. Fert.	RRL	—Zero participation in all activities
3. Arco	TMD, MSA & REB	—Price discipline —Bank Bids
4. Assoc. Prod.	MSA	—Percent reseller sales
		—Sales force (Organization)
5. Boyer Valley	TMD	—Percent reseller sales
6. Brayton	MSA	—Percent other sales (Minn.)
	RRL	—Pricing practices
	TMD & RRL	—Farmer sales
7. Central Soya	REB & TMD	—Program participation
		—Percent reseller sales

XVI. 1971 Distributor Review Guide (continued)

Distributor	District Manager	Issue
8. Cole/Hopkins	REB & TMD	—Program participation —Percent reseller sales activities
9. C.F.S.	RMD, NAS & TMD	—Lack of leadership from their home offices
	MSA	—Price discipline

[7]

Distributor	District Manager	Issue
10. Cypress Supply	REB, RRL & EEJ	—Percent reseller sales
	RRL	—Price discipline
	RRL	—Sales outside primary area
	RRL & EEJ	—Priority of Monsanto products
11. Desco	EEJ	—Farmer sales
12. E-Z-Flo	REB	—No activity
	EEJ	—Farmer sales, pricing policy
13. F.S. Services		O.K.
14. Farm Bureau Coop	EEJ	—Distributor Program Activity
15. Mich. Farm Bureau	EEJ	—Logistics, Sales priority
16. Felco		O.K.
17. Fuce		O.K.
18. Farmland	MSA, REB,	—Price administration
	& RRL	—Woodbury sales
19. FMC	EEJ	—Percent Reseller sales —Farmer sales, program participation pricing practices

XVI. 1971 Distributor Review Guide (continued)

Distributor	District Manager	Issue
20. W.R. Grace (Nashville)	REB	O.K. in Kentucky
(Joplin)	RRL	O.K.
(Indiana & Michigan)	EEJ	—Reseller shelves (Indiana) —Distributor Program & Sales ability (organization)
(Henry, Illinois)	TMD	—O.K.
21. Gulf	MSA, REB	—Zero program participation in Ky.
	& RRL	—Logistics
	RRL	—Dealer outlets (shelves)
22. Harris Serum	RRL	—Credit
23. Helena	RRL	—Price practices, Monsanto product priorities
24. Indiana Farm Bureau	EEJ	—Product priorities, stocking shelves
25. Kaiser	REB	—Zero support of Monsanto products and distributor program
26. Kay Dee	NAS	—Sales volume

[8]

27. Laverty Sprayers		—O.K.
28. MFA Oil	RRL	—Pricing policy
29. Midland		—O.K.
30. Midwest	MSA & RRL	—Percent reseller sales, sales outside geography (S.D., Minn.)

XVI. 1971 Distributor Review Guide (continued)

Distributor	District Manager	Issue
31. Mid-State	MSA	—Percent reseller sales —Sales outside geographic area
32. Occidental	REB EEJ, REB & TMD	—Creditability —Sales outside primary geography
33. J. M. Schultz	EEJ	—Indiana—No program support or in season shipments.
34. Seedkem	REB	—Credit
35. Smith-Douglass	REB	—Non-support of all programs (Ill.)
36. Sommer Brothers	RRL	—Marketing organization—Ability to stock reseller shelves
37. Sur-Gro		—O.K.
38. Southern States		—O.K.
39. Vistron		—O.K.
40. Wycon		—O.K.
41. Zehr & Co.	EEJ	—Percent reseller sales —Pricing policy
42. Terra	NAS & TMD	—Marketing organization —Farmer dealers

XVII. 1971 Marketing Program Objectives and Distributor Criteria

It was agreed that the objectives for the programs and criteria handed out will be the ones we use for 1972.

XVIII. 1972 Distributor Compensation Program

A. Dollar Compensation

It was agreed that we should definitely put more dollar compensation in our Distributor Program. A minimum of $.01/lb. of granular equivalent was suggested for compensation.

[9]

B. Letter of Authorization (Endorsement or Door Opener)

1. It was suggested that a letter of authorization stating that the distributor has signed a contract to sell Monsanto's corn, soybean and sorghum herbicides, and they have agreed to participate in all parts of Monsanto's Marketing Programs at all levels of management be attached to the contract.

2. R. Schweikher and D. Seitz will prepare a sample letter and send to the District Managers for their inputs, criticisms, etc. so we can have a rough outline by our May Meeting.

C. Actual Distributor Program Needs

1. Inventories by location

2. Sales by destination (minimum is by county)

3. Distributor advertising dollar allowance

4. Strategy Agreement—Each distributor will have a custom-designed strategy agreement written by the account manager.

5. Distributor Marketing Schools

a. May start by having one to two key people in each distributorship come to St. Louis to sign a contract and enlist in our 1972 program (may want to mail contract to them in advance).

We would want Monsanto's top management to meet with the distributors. May have a half day of

business and a half day of pleasure. We could have 20-30 people/day for three days and fulfill our needs.

b. We would then go to each distributor as we did this year and talk to all necessary people in each organization.

D. Future Action

It was agreed that each District Manager would take the recommended program needs and test each of these needs against their specific situations. The conclusions will be reported and discussed at our May meeting.

It is suggested that each district manager look at the mechanics, verbage, assets, and problems with this proposed program.

DEFENDANT'S EXHIBIT 38

MONSANTO'S 1972 DISTRIBUTOR MARKETING PROGRAM

Monsanto's 1972 Distributor Marketing Program will be based on distributor sales of Monsanto products to a business that sells 90% of his purchased agricultural chemicals directly to the ultimate consumer.

This program will apply to the following Monsanto herbicides:

Lasso E.C.	Ramrod 65 W.P.
Lasso 10-G	Ramrod/atrazine
Ramrod 20-G	Randox-T G

The maximum total available compensation is equal to \$0.0109/pound or \$1.09/100 pounds granular equivalent based on sales to a business that sells at least 90% of his purchased agricultural chemicals directly to the ultimate consumer. To earn the total available compensation in each part of the program, a distributor must meet all qualifications in each of the four parts of Monsanto's 1972 Distributor Marketing Program by August 31, 1972.

All dollar compensation earned in Monsanto's 1972 Distributor Marketing Program is payable only to the Monsanto distributor earning the compensation by completing the described activities.

1972 DISTRIBUTOR MARKETING PROGRAM PART I

Distributor Marketing Schools

A total of \$0.0004 per pound (\$0.04/100 pounds) of granular equivalent based on sales of Monsanto herbicides to a business that sells at least 90% of his purchased agricultural chemicals directly to the ultimate consumer is available

under this part of the program providing the following conditions are met:

1. All distributor personnel involved in *management* and *field sales* must attend (excluding retail outlet managers).

2. Each distributor is responsible for scheduling the meeting for his personnel with the Monsanto field account manager or local Monsanto district manager.

3. The Monsanto school must last a minimum of one-half (½) day.

4. Distributor Marketing Schools must be held prior to December 1, 1971.

1972 DISTRIBUTOR MARKETING PROGRAM PART II

Sales Information

A total of $.0015 per pound ($.15/100 pounds) of granular equivalent based on sales of Monsanto herbicides to a retailer business that sells at least 90% of his purchased agricultural chemicals directly to the ultimate consumer is available under this part of the program providing the following conditions are met:

1. A distributor must supply Monsanto a detailed report of his total sales on a form furnished by Monsanto to receive compensation under part II of the 1972 Distributor Marketing Program. This report must be submitted to the Monsanto account manager prior to August 1, 1972.

2. A distributor must provide total inventory numbers for his own warehouses by quantities by product by warehouse location prior to August 1, 1972.

   a. Beginning inventory by product of distributor titled goods (located in distributor warehouse and retailer business).

b. Ending inventory by product of distributor titled goods (located in distributor warehouse and retailer business).

3. A distributor must prepare a summary sheet which gives his total beginning inventory, total purchases for season, and total ending inventory by product prior to August 1, 1972.

All inventories and sales will be verified by the local Monsanto representative. A distributor must provide access for Monsanto representatives to verify sales and inventories. Failure to provide access will result in forfeiture of compensation under Part II of Monsanto's 1972 Distributor Marketing Program.

1972 DISTRIBUTOR MARKETING PROGRAM PART III

Distributor Early Purchase Program

Additional compensation can be earned by a distributor for purchasing Monsanto products between January 1 and February 29, 1972.

First Early Shipment Period

Orders placed prior to December 18, 1971 and shipped during calendar month of January, 1972 will receive $.006 per pound granular equivalent.

Second Early Shipment Period

Orders placed between December 19, 1971 and prior to Janaury 21, 1972 and shipped during calendar month of February, 1972 will receive $.003 per pound granular equivalent.

Shipments will be verified by Monsanto and compensation will be accumulated and paid to distributor in October, 1972. Detailed qualifications are in Price Sheet Number 71-46.

1972 DISTRIBUTOR MARKETING PROGRAM
PART IV

Retailer Early Shelf Stocking Program

Additional compensation of \$.003 per pound (\$.30/100 pounds) granular equivalent can be earned by a distributor stocking agricultural businesses that sell at least 90% of their purchased agricultural products directly to the ultimate consumer prior to February 15, 1972.

Conditions of this part of Marketing Program are:

1. Retailers must take physical and titled possession of Monsanto herbicides (Lasso E.C., Lasso 10-G, Ramrod 20-G, Ramrod 65 W.P., Ramrod/atrazine, and Randox-T) prior to February 15, 1972.

2. Retailers must notify Monsanto district sales office in writing (forms provided by Monsanto) prior to February 18, 1972 of shipments received.

3. Retailers notifications must contain the following information to retailers for early stocking payment:

   a. Copy of shipping or billing documents which establish physical movement.

   b. Quantity of each product purchased.

   c. Identify business or concern from whom products were purchased.

   d. Date products were received.

4. Retailer must provide Monsanto local representative access to product for physical verification as needed.

5. The individual Monsanto representative will be the only person to authorize qualification of a retailer under this portion of the program.

6. The distributor compensation will be based on retailer purchases verified by the local Monsanto representatives.

1972 DISTRIBUTOR MARKETING PROGRAM PART V

Advertising Participation

Monsanto will pay for the promotion of its proprietary herbicides to help distributors maximize their sale in the distributor's market.

Monsanto will reimburse the distributor for the total cost of ads based on verification* up to an amount equal to the total allowance, as determined according to the rate table below. These rates are based on 5¢/100 pounds of granular equivalent purchased.

* For verification, distributor must submit all of the following:

1. (a) For newspapers—a tear page of the advertisement.

or

(b) For radio & Television—an affidavit of broadcast from the station and a copy of the Monsanto announcements used.

2. A "paid" statement (invoice) showing total cost of advertising.

This advertising allowance is available to all distributors buying directly from Monsanto. All claims for advertising reimbursement must be submitted to the Monsanto district office serving the distributor.

The following is a list of products included in the program and the allowance earned by the purchase of each:

*Lasso Granules	$.025/50 lb. bag or $1.00/ton
*Lasso E.C.	$.02/gallon
*Ramrod Granules	$.025/50 lb. bag or $1.00/ton
*Ramrod W.P.	$.08/50 lb. carton or $3.27/ton

1972 DISTRIBUTOR MARKETING PROGRAM
PART V (continued)

*Ramrod/atrazine W.P. $.065/50 lb. carton or $2.50/ton

*Reg. U.S. Patent Office, Monsanto Company

Materials Supplied by Monsanto

For Local Newspaper and Radio—

Monsanto will supply materials necessary for carrying out a local promotional program. Materials will be available directly from Monsanto.

Newspaper Mats and Slicks (Proofs) in 2 sizes:

3 columns by 10 inches

2 columns by 5 inches

Radio Spots—printed script for one-minute and thirty-second product announcements.

Television—Thirty-second and one-minute length filmed TV commercials on Ramrod, Ramrod/atrazine and Lasso.

General Conditions

1. The allowance is available only for Monsanto products listed and purchased from Monsanto between January 1, 1972 and June 30, 1972.

2. No competitive pesticides may appear in advertising for which reimbursement is requested. Distributors who wish to advertise Monsanto pesticides along with other products and services they offer (excluding competitive pesticides) may do so provided reference to Monsanto products is in accordance with the product descriptions appearing in Monsanto-furnished ad mats, slicks, and radio scripts. Monsanto reimbursement will cover only that part of the advertising devoted to Monsanto products.

1972 DISTRIBUTOR MARKETING PROGRAM
PART V (continued)

General Conditions (continued)

3. Advertising to be submitted for reimbursement must be placed in media with published coverage and rate information. No regional magazines, state farm publications or media circulating beyond the distributor's normal marketing radius are eligible for reimbursement within this program.

4. Advertising must be published or broadcast during the period January 1, 1972 to July 1, 1972. Advertising published or broadcast prior to or following this period is not eligible for reimbursement within this program.

5. Requests for reimbursement should be submitted to the distributor's Monsanto district office at any time prior to but not later than August 1, 1972. Any part of the allowance unused by that date shall not be available for reimbursement.

6. No Monsanto personnel or any other person has the right to amend or change any of these terms and conditions without prior approval in writing from Monsanto's Agricultural Advertising Department in St. Louis.

7. This program is offered and in effect for 1972 only.

ALL ADVERTISING MUST BE COMPLETED BETWEEN JANUARY 1, 1972 AND JULY 1, 1972

ALL CLAIMS MUST BE SUBMITTED BY AUGUST 1, 1972.

DEFENDANT'S EXHIBIT 190

[1]

LIST OF MONSANTO'S MIDWEST DISTRIBUTORS AND THEIR RESPECTIVE AREAS OF PRIMARY RESPONSIBILITY

1968 DISTRIBUTORS

MINNESOTA

Agrico
Associated Prod.
Aylco
Cashman
Castle Chem.
Chevron
FMC Corp.
FUCE
Farmers Regional
Interstate Seed
Kay Dee
Midland Cooperatives
Minnesota Farm Bureau
Olin
Sexauer
Smith-Douglass
Thompson-Hayward
Woodbury

NEBRASKA

Anderson Feed & Seed
Chevron
FMC Corp.
Farmers Regional
Farmland Ind.
Kay Dee
Miller Chem.
Olin
Randolph Fert.
Sexauer
Terra Chem.
Thompson-Hayward
Tyson's
Woodbury

SOUTH DAKOTA

Chevron
FMC Corp.
FUCE
Farmers Regional
Kay Dee
Sexauer
Thompson-Hayward

ILLINOIS

Agrico
Atwood Grain
Aylco
Brayton Chem.
Central Soya
Chevron
FMC Corp.
F.S. Services
Farmers Regional
Funk Bros.
W. R. Grace & Co.
Haskett Fert.
Hamilton Co.
Harbrand, Inc.
Hub Oil
Indian Point
Geo. Keller & Son
Marquiss Farm Sup.
Olin
Schaefer Sup.
Schultz Seed
Seedkem
Smith-Douglass
Sprayrite
Swift Ag. Chem.
Thompson-Hayward
Trissler Seed
Van Horn Hybrids
Woodtreating

IOWA

American Oil
Anderson Feed & Seed
Boyer Valley Fert.
Brayton Chem.
Castle Chemical
Chem. Gro Fert.
Chevron
FMC Corp.

F.S. Services
Farmers Regional Coop
Farmland Industries
W. R. Grace & Co.
Gro-Mo-Co.
Hamilton Company
Hopkins Ag. Chem.
Kay Dee Feed
Laverty Sprayers
Midland Cooperatives
Reed Bros.
Swift Ag. Chem.
Terra Chem.
Thompson-Hayward
Woodbury

WISCONSIN

American Oil
Associated Producers
Castle Chemical Co.
E-Z Flow
FMC Corp.
Farmers Union Central
F.S. Services
Hopkins Ag. Chem.
Midland Coop.
Smith-Douglass

* * *

[5]

1972 DISTRIBUTORS

MINNESOTA

American Cyanamid
American Oil
Arco Chemical
Custom Farm Services
Farmland Industries
FUCE
Farmers Regional
Kaiser Ag. Chem.
Kay Dee Feed
Midland Cooperatives
Mid-State Chemical
Peavey Company
Terra Chemical
U.S.S. Agri Chem.

SOUTH DAKOTA

American Cyanamid
American Oil
FUCE
Farmers Regional
Farmland Ind.
Kay Dee Feed
Mid-State Chemical
Peavey Company
Terra Chemical
U.S.S. Agri Chem.

NEBRASKA

American Cyanamid
American Oil
Custom Farm Services
Farmland Ind.
Farmers Regional
Harris Serum
Kay Dee Feed
Midwest Ag. Whse.
Sur-Gro Plant Food
Terra Chemical
U.S.S. Agri Chem.

ILLINOIS

American Cyanamid
American Oil
Arco Chemical
Brayton Chemical
Central Soya
Custom Farm Services
Cypress Supply
F. S. Services
Farmland Ind.
W. R. Grace & Co.
Hopkins Ag. Chem.
Kaiser Ag. Chem.
Occidental Chemical
J. M. Schultz Seed
Seedkem, Inc.
Terra Chemical
U.S.S. Agri Chem.
Vistron Corp.

IOWA

American Cyanamid
American Oil
Anderson Feed & Seed
Arco Chemical
Boyer Valley Fert.
Brayton Chem.
Custom Farm Services
Cypress Supply
F. S. Services
Farmers Regional Coop
Farmland Industries
W. R. Grace
Kaiser Ag. Chem.
Kay Dee Feed
Laverty Sprayers
Midland Cooperatives
Terra Chem.
U.S.S. Agri Chem.
Vistron Corporation

WISCONSIN

American Oil
E-Z Flow
Felco/Land O'Lakes
F.S. Services
FUCE
W. R. Grace
Cole Chemical
Midland Coop.
Terra Chemicals
U.S.S. Agri-Chemicals

DEFENDANT'S EXHIBIT 272

MONSANTO COMPANY
800 N. Lindbergh Boulevard
St. Louis, Missouri 63166
(314) OXford 4-1000

November 11, 1968

Mr. Fred H. Bailey
Associated Producers, Incorporated
29 East Indiana Avenue
St. Paul, Minnesota 55107

Dear Fred:

I have just received comments from our group in St. Louis who read with great interest your October 1, 1968, communique, "Today in Agribusiness," a copy of which was forwarded to me by one of our field men. In summary, Fred, your remarks concerning our positive marketing changes were most gratifying; however, we were disturbed by the implications of some of the statements made in the communique. I was asked to write to you and correct immediately any misconceptions about Monsanto's marketing policies.

More positively stated, it is Monsanto's goal to make the best return possible on the sale of all of its products while providing a fair return to distributors and dealers performing important functions in distributing Monsanto products to the largest possible number of farmer-customers.

With this in mind, Monsanto establishes a distributor price for Monsanto sales to distributors and a dealer price for Monsanto sales to dealers for each product. We also suggest a dealer price for distributors as an aid to them in determining a fair return in a competitive market. This *suggested* price is nothing more than that. Once a distributor buys a Monsanto product, he may sell it at whatever price he sets and on whatever terms and conditions he deems proper for him. The same holds true in the case of dealers buying directly from Monsanto, where Monsanto suggests a retail price. Monsanto *has not* and *will not* enter into *any* agreement —express or implied—with distributors, dealers or anyone else concerning the resale price of its products.

(Continued)

Mr. Fred H. Bailey PAGE 2
Associated Producers, Inc.
St. Paul, Minnesota 55107 November 11, 1968

In similar regard, Monsanto *alone* establishes the policies of its retail outlets, and we *have not* and *will not* agree with anyone else concerning the customers to whom and the prices at which those Monsanto outlets will or will not sell.

To sum it up, Fred, Monsanto cannot and does not intend to regulate, influence, demand or force pricing control on any distributor or dealer. I am writing to you to insure that no misunderstanding or misinterpretation of Monsanto's marketing policies is made on the basis of your October 1 newsletter. You may wish to either forward copies of this letter to the dealers who received that communique, or inform them in some other way of our policies.

Once again, Fred, I would like to thank you for your favorable remarks about Monsanto contained in the newsletter and to wish you a highly successful and profitable year in 1969.

Sincerely,

/s/ D. R. FISCHER

D. R. Fischer
Director, Pesticide Sales

DFR:sbl

cc: James E. Sovocool
129 West Glencrest Drive
Mankato, Minnesota 56001

bc: J. W. Gillespie
R. T. Gravitte
R. M. Schweikher
A. F. Davis
R. E. Blackwelder
R. P. Lane
C. W. Detert
File Assoc. Producers

DEFENDANT'S EXHIBIT 465

SPRAY-RITE SERVICE CORPORATION
Manufacturers and Distributors
MAIN OFFICE
10216 N. Second (Hwy. 51 North)
Rockford, Illinois 61111
Phone 815-633-2357
February 18, 1966

Dear Friends:

Again we approach another growing season and to us a chemical season. We are looking forward to it enthusiastically—there is so much we want to learn that only a growing season can accomplish. Our industry both Agriculture in general and Agriculture chemicals in particular are in constant change. The introduction of new chemicals, plus old chemicals with new techniques, brings constant surprises and requires deep concentration and evaluation. Another growing season is such a challenge to us with so much to accomplish in so little time. The *challenge of Agriculture* in the eyes of each of us, is indeed massive. However, to produce *more-for-less-easier* is a good, prudent guide.

Personally, I foresee great opportunities in Agriculture today and much greater tomorrow. I feel we are on the verge right now of a boom in Agriculture that we have long been awaiting and will continue indefinitely.

I too, approach this new growing season with much enthusiasm—with new ideas and new techniques that look promising, yet need proof from the field—new tools to fight old enemies—I will again be asking many of you, as in the past, to help me in this evaluation of new tools. Because we all know so well that actually "Agriculture is a controversy with weeds and insects".

I hope we can have time to talk with each one of you individually in hopes we can be of help in adapting chemicals or techniques to your particular operation; be it soil type,

equipment availability, shortage of manpower or crop rotational limitations.

We spread ourselves quite thin in a large volume, small-margin operation and the reason we do this is because we are unable to find anyone crazy enough that will work cheap enough and still be highly qualified.

I hope you can find it practical to come in early that we might discuss matters in depth of mutual concern. As the season gets closer, our time gets so limited with our type of operation, that I cannot offer services that I feel are so necessary in this technical, exacting business of Agricultural Chemicals. We feel we can be of much value to you this year and for the future.

Please give us a call.

Sincerely,

/s/ DON YAPP

Don Yapp
Spray-Rite Service Corporation

DY:h

P.S.: There are many chemicals in critical short supply this year. Another reason to come early.

DEFENDANT'S EXHIBIT 466

1970-1973 SUMMARY OF HERBICIDE SALES REPORTED TO MONSANTO (DX287 AND DX288) BY ALLEGED "CO-CONSPIRATOR" DISTRIBUTORS NAMED IN PARA. 5 OF AMENDED COMPLAINT (GRANULAR EQUIVALENT)

Associated Producers, Inc.
(Fred Bailey)
St. Paul, Minnesota

	1970*	1971	1972
Retailers Sold	139	93	[Not renewed]
Total Pounds Sold.........	4,998,488	4,885,788	
% Sold to Non-Retailers ...	34.4%	61.9%	
% Sold Outside Primary Area..................	7.7%	—	
No. of States in Primary Area..................	3	1	
No. of States Sold Outside Primary Area	3	1	

* Incomplete information for 1970; sales information requested by first cumulative truckloads sale only.

Brayton Chemicals, Inc.
(Bert Brayton)
Burlington, Iowa
(Current Distributor)

	1970*	1971	1972	1973
Retailers Sold	442	526	615	760
Total Pounds Sold	8,351,605	11,712,578	14,604,994	25,920,488
% Sold to Non-Retailers.......	43.3%	26.3%	26.8%	5.1%
% Sold to Outside Primary Area ..	—	2.6%	20.6%	2.3%
No. of States in Primary Area ..	4	4	3	3
No. of States Sold Outside Primary Area	—	6	4	2

* Incomplete information for 1970; sales information requested by first cumulative truckload only.

Cole-Hopkins Agricultural Chemicals
(James Hopkins)
Madison, Wisconsin
(Current Distributor)

	1970*	1971	1972	1973
Retailers Sold	371	428	367	282
Total Pounds Sold	4,327,008	5,525,773	5,351,785	6,813,619
% Sold to Non-Retailers.......	21%	15.1%	2.3%	4.1%
% Sold Outside Primary Area ..	1.4%	2.3%	3.5%	5.2%
No. of States in Primary Area ..	2	2	2	2
No. of States Sold Outside Primary Area	2	4	3	4

* Incomplete information for 1970; sales information requested by first cumulative truckload only.

Laverty Sprayers, Inc.
(Leo Sterk)
Indianola, Iowa
(Current Distributor)

	1970*	1971	1972	1973
Retailers Sold	46	67	82	87
Total Pounds Sold	1,633,697	4,486,255	5,049,639	5,202,831
% Sold to Non-Retailers.......	28.5%	54.7%	55.4%	37.4%
% Sold Outside Primary Area ..	6.8%	33.1%	44.1%	10.5%
No. of States in Primary Area ..	3	3	3	3
No. of States Sold Outside Primary Area	1	2	1	1

* Incomplete information for 1970; sales information requested by first cumulative truckload only.

Midstate Chemical Company
(John Mulvehill)
Bird Island, Minnesota

	1970*	1971	1972	1973
Retailers Sold	59	66	85	54
Total Pounds Sold	8,666,418	7,928,071	16,418,814	4,455,390**
% Sold to Non-Retailers	62.6%	47.8%	60.5%	12.1%
% Sold Outside Primary Area ..	11%	20.8%	48.2%	4.8%
No. of States in Primary Area ..	4	2	2	2
No. of States Sold Outside Primary Area	3	1	2	1

* Incomplete information for 1970; sales information requested by first cumulative truckload only.

** Van Diest Supply Co. appointed Monsanto distributor in 1973.

Midwest Agricultural Warehouse Co.
(Philip James)
Freemont, Nebraska
(Current Distributor)

	1970*	1971	1972	1973
Retailer Sold	37	173	245	173
Total Pounds Sold	3,334,313	12,970,216	5,057,276	7,935,535
% Sold to Non-Retailers	34.7%	66.9%	14.9%	29.1%
% Sold Outside Primary Area ..	4.7%	—	12.5%	—
No. of States in Primary Area ..	7	6	5	7
No. of States Sold Outside Primary Area	2	—	2	—

* Incomplete information for 1970; sales information requested by first cumulative truckload only.

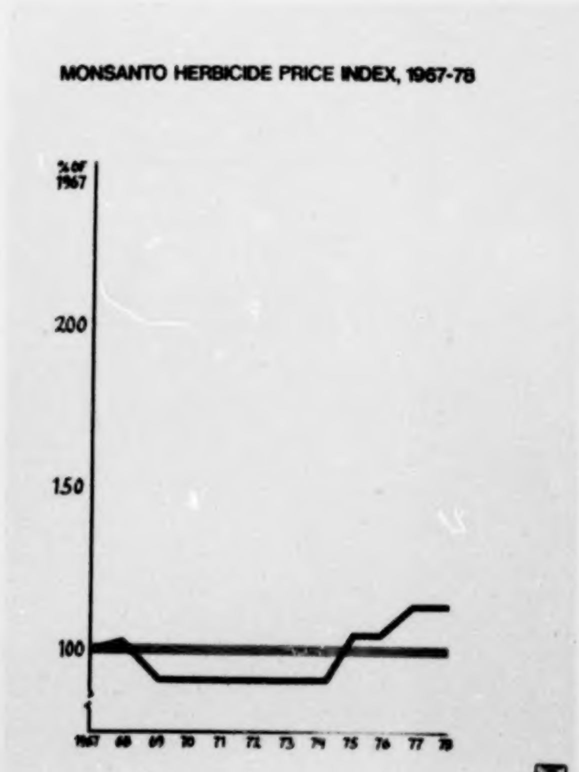
(Formerly Anderson Feed & Seed Co.)

Van Diest Supply Co.
(Robert Van Diest)
Webster City, Iowa
(Current Distributor)

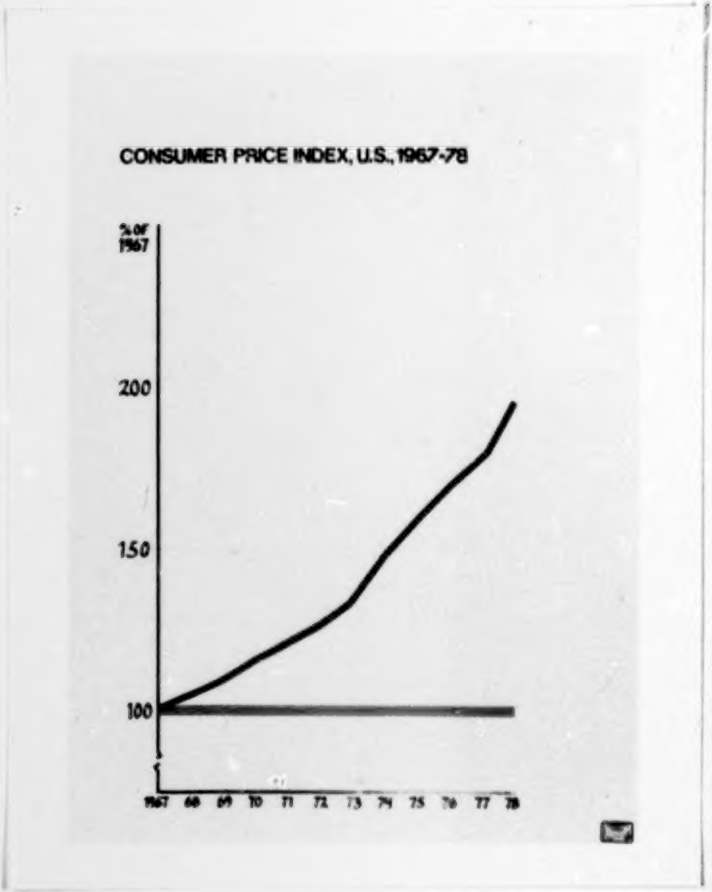
	1973	1974
Retailers Sold	301	386
Total Pounds Sold	18,881,551	33,205,051
% Sold to Non-Retailers	18.1%	4.2%
% Sold Outside Primary Area	21.7%	27.8%
No. of States in Primary Area	2	2
No. of States Sold Outside Primary Area	8	12

* First appointed as a distributor for 1973 season.

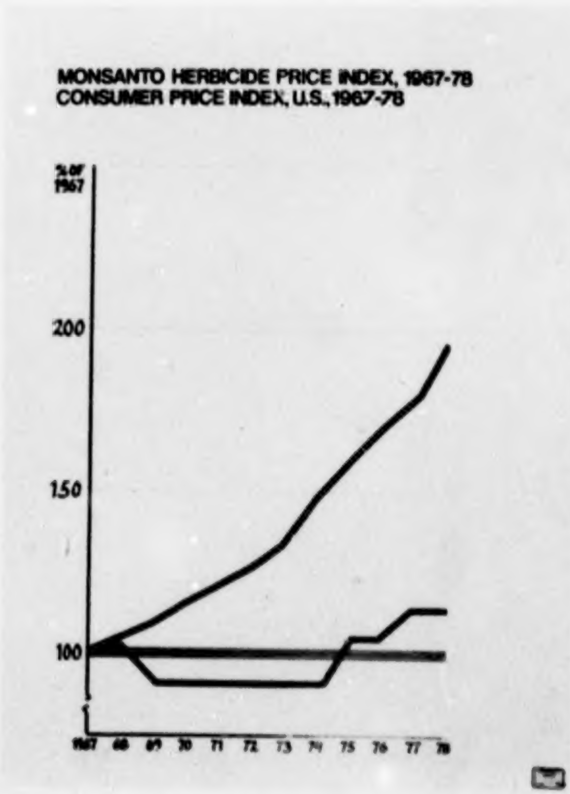
DEFENDANT'S EXHIBIT 467a



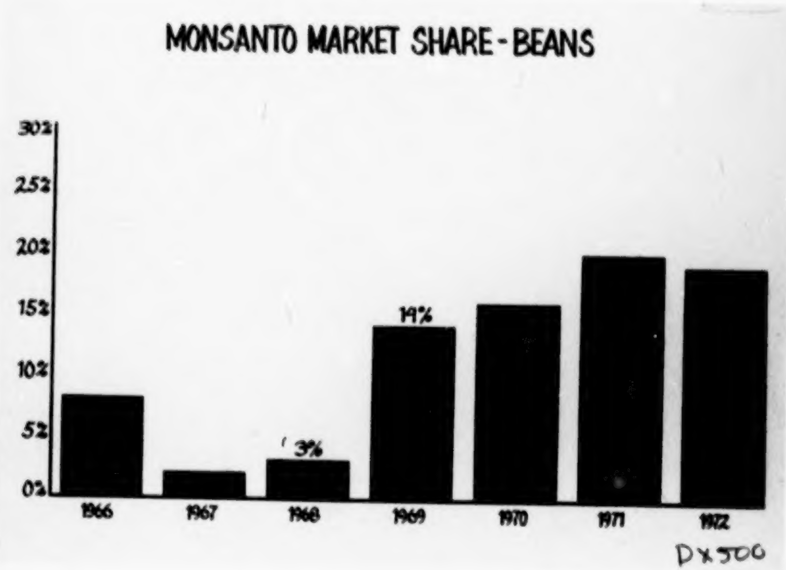
DEFENDANT'S EXHIBIT 467b



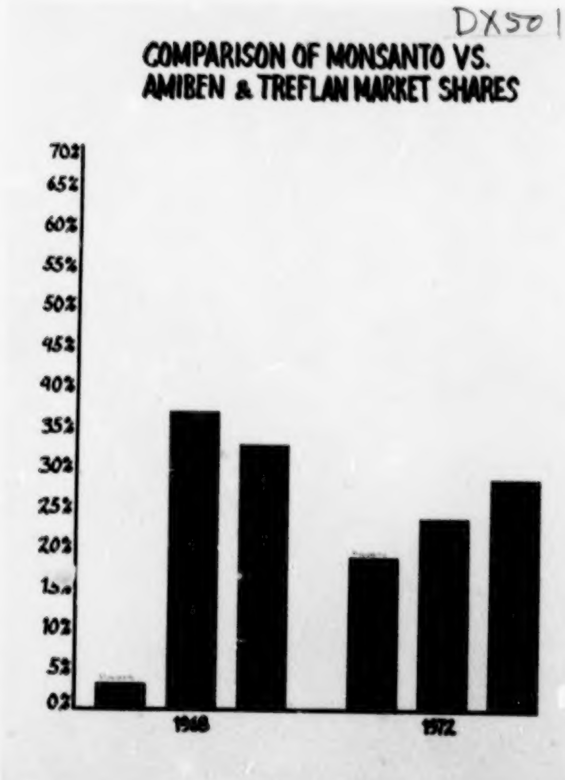
DEFENDANT'S EXHIBIT 467c



DEFENDANT'S EXHIBIT 500



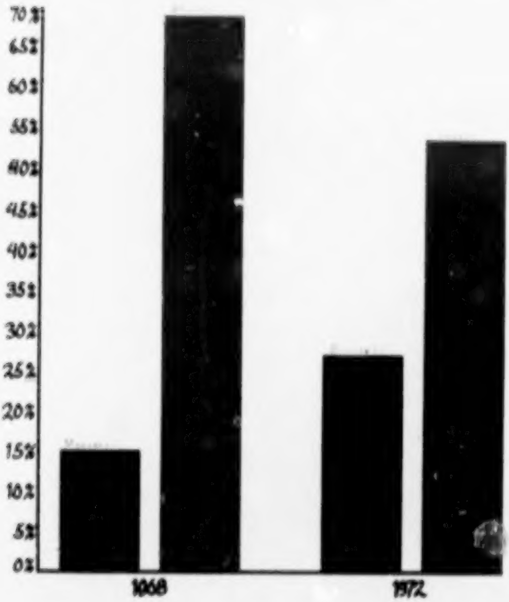
DEFENDANT'S EXHIBIT 501



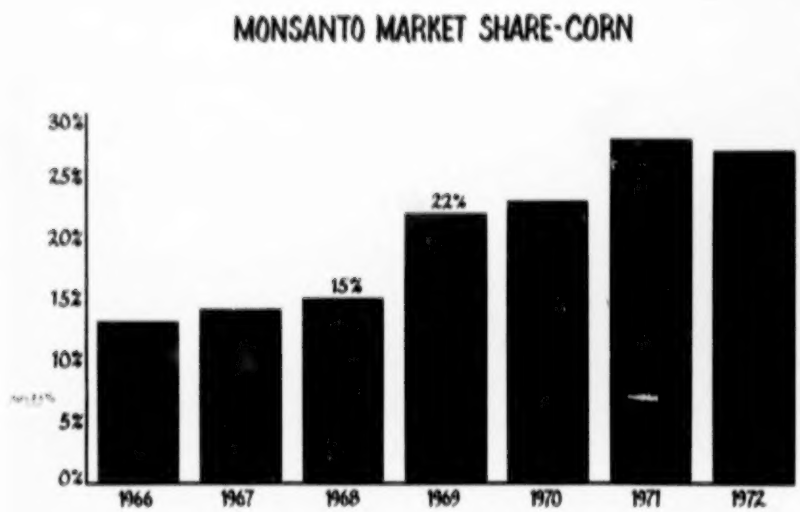
DEFENDANT'S EXHIBIT 502

DX 502

COMPARISON OF MONSANTO VS. ATRAZINE MARKET SHARE-CORN



DEFENDANT'S EXHIBIT 503



No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

EARL A. JINKINSON
(*Counsel of Record*)
ROBERT G. FOSTER
Suite 5000
One First National Plaza
Chicago, Illinois 60603
(312) 558-5600

Attorneys for Respondent

WINSTON & STRAWN
Suite 5000
One First National Plaza
Chicago, Illinois 60603

Of Counsel

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Strip away the strawmen, the record distortions and the mischaracterizations of the Seventh Circuit's opinion, and the essence of Monsanto's Petition raises not a legal contention, but the claim that the jury, the trial judge and the Seventh Circuit ignored what Monsanto claims are dispositive facts. Thus, the only question presented by the Petition is:

> Whether there was sufficient evidence to sustain the jury's findings regarding defendant's per se violations of Section 1 of the Sherman Act?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION[1]

COUNTERSTATEMENT OF THE CASE[2]

Summary of Proceedings Below

Respondent, Spray-Rite Service Corporation, filed its Complaint on February 24, 1972, amended in 1975, charging petitioner Monsanto Company with violations of Section 1 of the Sherman Act. (*See* Amended Complaint ¶ 11)

[1] Pursuant to Rule 28.1, Spray-Rite Service Corporation states that it is a closely-held corporation which does not have any parent companies, subsidiaries or affiliates.

[2] Although this Court's Rule 21 states that petitioner's statement of the case is to be "*concise*" and contain only the "facts" material to the questions presented, Monsanto's statement is neither concise nor factual. It is nothing more than arguments and contentions interspersed with record distortions.

An example is Monsanto's bald assertion that "[l]ike all manufacturers, Monsanto was interested in resale price levels in its markets." (Pet. at 6) There is no citation, of course, since there is no evidence whatsoever in the record regarding the "interests" of other manufacturers.

Trial commenced on January 14, 1980, and the jury returned a verdict for plaintiff in the untrebled amount of

(footnote continued)

Another example is Monsanto's claim that there is no evidence that "any distributor agreed to follow Monsanto's suggested prices." (Pet. at 7) In fact, the evidence of such agreement is overwhelming. For example, when Spray-Rite attempted to purchase Monsanto products in the year after its termination, Associated Producers, a Monsanto distributor, quoted Spray-Rite the suggested price pursuant to "control" exerted by Emmett H. McCormick, then a Monsanto district manager. (Tr. 792, 1951, 1955) The following year when Spray-Rite approached distributor Laverty Sprayers and asked to buy Monsanto products at one-half cent per pound below suggested price, Laverty's general manager refused, because a "distributor in Missouri had reduced it a half cent a pound and he is no longer a distributor." (Tr. 865-66) Likewise, a Monsanto memorandum regarding its distributor presentation to distributor W. R. Grace stated:

> Presentation was well received and Mr. Chandler indicated he would comply with the requests we made. He will again handle all orders for this region and . . . maintain pricing control. . . .

PX 325. *See also* PX 357. A final example is the October 1, 1968 newsletter of distributor Associated Producers, discussed *infra* at p. 9.

It would require more than the pages allotted for this brief to refute all of the record distortions in Monsanto's statement. But even more egregious are its repeated mischaracterizations of the Seventh Circuit's opinion. A typical example is Monsanto's claim that the Seventh Circuit "did not address whether respondent had proven an overall resale price maintenance conspiracy between Monsanto and its distributors." (Pet. at 3) Even a cursory examination of the opinion demonstrates that this claim is nonsense. (*See* App. at A16-17)

A more clever subterfuge is Monsanto's attempts to transform its contentions into Seventh Circuit findings. Monsanto therefore asserts that "[t]he court acknowledged that respondent 'was only able to show that Monsanto was concerned about the resale price of its herbicides and that it received some price complaints about [respondent] from other distributors.'" (Pet. at 8-9) Examination of the opinion demonstrates beyond peradventure that the Seventh Circuit did not so acknowledge and was instead restating a Monsanto claim. (App. at A14-15)

$3,500,000 on February 21, 1980. (Tr., Feb. 21, 1980, at 2) The jury also answered affirmatively the following special interrogatories requested by Monsanto:

1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto's herbicides? Answer: *Yes.*

2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides? Answer: *Yes.*

3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968? Answer: *Yes.*

(*Id.* at 2-3) (Emphasis added) The district court denied Monsanto's motions for a directed verdict new trial and judgment n.o.v. (App. at D1-2)[3]

On June 28, 1982, the Seventh Circuit unanimously affirmed. (684 F.2d 1226) On September 8, 1982, the Court of Appeals denied Monsanto's petition for rehearing with suggestion for rehearing *en banc.* (App. at E-1)

The Parties

A. Spray-Rite Service Corporation ("Spray-Rite")

Spray-Rite began distributing agricultural chemicals in 1955. (Tr. 509) In 1957 it became an authorized distributor

[3] The following abbreviations are used in this Brief: "Tr." (trial transcript); "PX" (plaintiff's exhibit); "DX" (defendant's exhibit); "Pet." (Monsanto's Petition for Certiorari); "App." (Appendix to Petition).

of Monsanto herbicides, and Monsanto sold directly to Spray-Rite from 1957 until its termination as a distributor in October of 1968. (PX 167; PX 174; PX 201; Tr. 1222-24) At the time of its termination, Spray-Rite had grown to be Monsanto's tenth largest distributor (out of approximately 100) and the eighth most proficient in meeting Monsanto's performance goals. (Tr. 1549-50; PX 426)

Dr. Ellery Knake, Professor of Weed Science at the University of Illinois, testified that Don Yapp, Spray-Rite's president, was innovative, imaginative and a pioneer in the application of herbicides. (Tr. 751) Spray-Rite was one of the few distributors selected by Monsanto to test its new products in 1965. (Tr. 603, 1500-01)

Spray-Rite made deliveries 24 hours a day, seven days a week. (Tr. 572, 907, 2127) Dr. Earl Hughes testified that Hughes Hybrids bought its herbicides from Spray-Rite because it was an innovator, "knew the business" and provided "very good service." (Tr 1234-35) John Case, owner of PAG of Naperville, testified that his company bought all of its Monsanto herbicides from Spray-Rite because it "was able to provide . . . product at a reasonable price, give us excellent service in season [and] provide us with the technical information to make sure our growers got the best results from the product. . . ." (Tr. 1710) Robert Tracey, Chairman of the Board of Tracey & Sons, stated that Spray-Rite "gave us great help in learning how to handle these herbicides," that his company depended on Spray-Rite for herbicide recommendations, and that he never had a supplier of herbicides who gave better service than Spray-Rite. (Tr. 898, 901-03, 906-07) As one retailer put it: "[A]s far as I was concerned he [Yapp] was Monsanto in Northern Illinois." (Tr. 1714)

B. Monsanto Company ("Monsanto")

During the relevant period Monsanto manufactured patented, proprietary herbicides.[4] (PX 139; Tr. 1605-06) Since Monsanto's herbicides, like those of other manufacturers, could only be used with certain crops to treat certain weeds, the successful herbicide distributor had to have a full line of herbicides from all manufacturers in order to service his customers' needs. (Tr. 571, 581-82, 681-82, 872, 1360, 1388, 3597)

Brief Summary of Conspiracy Evidence

A. Pre-termination

Spray-Rite was known by its customers, competitors and Monsanto as an aggressive price-cutter. (Tr. 614-16, 1375-79, 1392, 2394-96, 3200, 3573, 3662) Hopkins, one of Spray-Rite's major competitors, testified that Spray-Rite set the level of competition in pricing for southern Wisconsin and northern Illinois. (Tr. 1375-77) In 1968, the year of its termination, all of Spray-Rite's sales of Monsanto herbicides were below Monsanto's suggested prices. (Tr. 3178)

The complaints about Spray-Rite's prices, particularly from less efficient and less profitable competitors, were

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[4] Monsanto's "Business Plan," written two years after Spray-Rite's termination, stated:

> B. Proprietorship.
>
> The rapid growth of the corn/soybean pre-emergent herbicide market has been due in large part to the development of a few highly selective compounds. These compounds are the patented property of a handful of large companies marketing agricultural chemicals. The proprietary nature of these compounds and their varying levels of activity and selectivity has [sic] resulted in a relatively stable market with respect to price.

PX 139.

legion. (Tr. 103-04, 107-11, 118, 122, 127-29, 1398, 3631, 3657-58; PX 185) David Stein, a Monsanto district manager, testified that complaints about Spray-Rite's pricing on Monsanto herbicides came from virtually everyone in the distribution system, and that both his superiors and "other distributors" complained about its prices. (Tr. 2396)

Philip James, Monsanto's sales representative in Spray-Rite's trade area of northern Illinois during 1964-65, testified that Spray-Rite was an aggressive price-cutter, that he had received complaints about Spray-Rite's prices from many of its competitors including Funk Bros., Farm Services, Thompson-Hayward and Remole Soil Service, and that he reported what happened in the field to Monsanto's main office in St. Louis. (Tr. 3631, 3657-59)

Michael Flynn, James' successor, testified that he received distributor complaints about Spray-Rite's pricing "at least 20 times" from American Oil, Farm Services, Funk Bros., C.D. Ford & Sons, Hub Oil, Cole Chemical, Bureau Service Company, Hopkins and FMC (Tr. 109-29). Flynn stated that Monsanto was concerned about the prices distributors were charging for Monsanto herbicides, and that St. Louis "wanted to know what the pricing was in the area." (Tr. 115-16)

Flynn testified that Spray-Rite published its prices in flyers distributed to dealers and farmers, and that he "sent one of them to St. Louis as, you know, what Spray-Rite was doing." (Tr. 117, 119) Spray-Rite was the subject of at least 25 of his call reports to St. Louis, and in "at least half" Flynn discussed complaints by named distributors regarding Spray-Rite's prices. (Tr. 120-21). Flynn also had conversations with various Monsanto personnel about Spray-Rite's prices, including James, Bill Butler, Bob Wilson and Dick Johnson. (Tr. 121-22) Spray-Rite's pricing was also

"brought . . . to the attention of product supervisors in the herbicide product group." (Tr. 122)

Flynn also testified that on "three or four" occasions he approached Don Yapp regarding Spray-Rite's prices. (Tr. 110-11, 114):

> I would go into Don and encourage him to maintain or to derive the profitability out of the product that was suggested to him. . . ."

Tr. 114. Flynn recalled one occasion where Farm Services, "a highly valued customer of Monsanto in the herbicide field," complained directly to St. Louis about Spray-Rite's prices. (Tr. 122-26) Flynn was told by St. Louis to "verify the complaint," which he did by going to Farm Services in Bloomington, Illinois. (Tr. 125) Armed then with information from Farm Services regarding the "specific areas where the pricing problems" by Spray-Rite were, Flynn went directly to Spray-Rite to "make the statement that we have received complaints." (Tr. 125)

In another instance, distributor James Hopkins complained about Spray-Rite's prices to Bob Wilson, a Monsanto salesman in Wisconsin, who in turn told Flynn to keep Spray-Rite out of Wisconsin. (Tr. 127-28) On May 7, 1967, Hopkins wrote Arvan, Monsanto's General Manager for Agricultural Chemicals, and complained that a distributor was unloading excess inventories at depressed prices—an activity that was "definitely not conducive to an orderly marketing structure." (PX 185)

Flynn also testified regarding a complaint about Spray-Rite he received from Garland Grace, a field salesman for distributor FMC. (Tr. 128-29) Grace complained that "he could not meet [Spray-Rite's] competition in terms of price," showed Flynn Spray-Rite's price flyers, and "wanted to know if I [Flynn] *could do anything about it.*" (Tr. 129) (Emphasis added)

In response to these distributor complaints and requests for action, Monsanto first threatened Spray-Rite and then carried out the threats by actual termination. (Tr. 615-20, 701-12, 767) In June or July of 1966, Bill Butler, Monsanto's district manager for Spray-Rite's trade area, telephoned Don Yapp and asked him to attend a meeting at the district office. (Tr. 615) Yapp met with Butler and Arvan, and both questioned Yapp regarding the prices Spray-Rite quoted for Monsanto's Ramrod to Meiers, Inc. (Lexington, Illinois) and other customers. Yapp testified:

> Mr. Arvan told me that we had better increase our prices, if we do not increase our prices we may lose our distributorship.

Tr. 619.

In January of 1967, Yapp received telephone calls from Bill Bone, Butler's successor as district manager, and Donald Fischer, who Yapp believed "was in charge of herbicides . . . at Monsanto, St. Louis." (Tr. 620-27) Both inquired regarding Spray-Rite's prices. (Tr. 626)

In the spring of 1968, Bone called Yapp and asked whether Spray-Rite was aware of Monsanto's suggested prices. (Tr. 701-04) Bone said that Spray-Rite was to sell at the suggested price, and if Spray-Rite did not know the prices, he would send a price list. (Tr. 702-03) Bone did send Spray-Rite a price list with the words "Dealer Price" underscored and a note that the list was from him. (Tr. 704; PX 202) Bone also told Yapp that if Spray-Rite did not follow the suggested prices, "retaliation was going to take place." (Tr. 711) Spray-Rite refused to raise its prices. (Tr. 712)

B. Termination

On October 28, 1968, Fischer informed Yapp that Monsanto had terminated Spray-Rite's herbicide distributor-

ship.[5] (Tr. 767) When Yapp went to St. Louis to plead for reconsideration because Spray-Rite needed Monsanto's products, the first thing Fischer told him was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 768, 774, 1295)[6]

[5] James Sovocool, a Monsanto area supervisor, told McCormick that if Monsanto could get Spray-Rite and one other price-cutter "*squared away*, we could stabilize things around here." (Tr. 1946) (Emphasis added) Termination certainly "squared away" Spray-Rite (Tr. 2681), and by 1970 Monsanto was able to achieve what it described as a "relatively stable market with respect to price." (PX 139 at 4)

[6] The chilling effect of Spray-Rite's termination was immediately apparent. (PX 233) At the time Spray-Rite was being terminated, Monsanto was introducing Lasso, an improved product for which there would be immediate demand. (Tr. 1929) Monsanto therefore sought to stabilize Lasso's price in order to avoid losing dealer support (Tr. 1558, 1929, 1936-37). Its new program for the coming season was most aptly described by distributor Associated Producers in an October 1, 1968 newsletter:

> Monsanto, now recognizing the absolute necessity of getting the "market place in order" with regard to their entire line of agricultural chemicals, is determined to do what it takes to rectify the situation from now on.
>
> * * *
>
> [E]very effort will be made to maintain a minimum market price level.
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> * * *
>
> In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as *the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons.* So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity.

PX 233 (Emphasis added).

C. Post-termination Boycott

Thomas Dille, Monsanto's district manager for Spray-Rite's trade area from December of 1968 until the end of 1971, testified that during this period he received Spray-Rite price flyers from Monsanto salesmen and in the mail. (Tr. 1735) He also stated that both he and his salesmen received "many" complaints from Monsanto distributors and dealers regarding Spray-Rite, and that he "probably" passed these complaints to St. Louis. (Tr. 1736, 1741-42) More specifically, Dille testified that the complainants inquired "what will you do," and that they asked whether Monsanto could cut off Spray-Rite's source of Monsanto products. (Tr. 1741-42) Dille also passed these inquiries to St. Louis. (Tr. 1741)

Flynn testified that "[i]n either the 1969 or the 1970 season, Monsanto became aware that Don Yapp did have some Monsanto product . . . ," and that Tom Dille asked him if he had "any information as to where Don Yapp did get this product." (Tr. 169) Flynn then called in some dealers and "in an indirect method attempted to determine where Don got his product." (*Id.*) At a subsequent meeting of sales representatives for the Muscatine district, "Tom Dille conveyed that he did not want Don Yapp to get any product." (Tr. 170-71)

McCormick testified that during the time he was a Monsanto district manager (fall of 1968 through October 1969), "we [at Monsanto] were trying to find out what he [Yapp] got his products for . . . , and who sold it to him." (Tr. 1949) The subject of who was selling Spray-Rite and at what price was specifically discussed at a district manager's meeting in St. Louis. (Tr. 1949) McCormick testified that on several occasions Monsanto's Schweikher asked Associated Producers whether it had sold Monsanto product to

Spray-Rite. (Tr. 1949, 1951) McCormick then admitted that he "told Fred Bailey [of Associated Producers] that he wasn't supposed to sell Don Yapp," and that his command was obeyed. (Tr. 1951) When asked the purpose of all this effort, McCormick flatly declared that the purpose was "to keep Don Yapp from tearing up the marketing." (Tr. 1950)

Monsanto also told John Mulvehill, president of Midstate Chemical Co., not to sell to Spray-Rite. (Tr. 274-75) In March of 1970 Mulvehill was in St. Louis and met with Stewart Daniels, Assistant General Manager of the Agricultural Division:

> And among other things, had a nice one-on-one session with Mr. Stew Daniels who . . . told me that I shall not sell Spray-Rite in Illinois. . . . I said, "What's going to happen if I do?" He said, "You know what's going to happen." "You mean I may not be selling next year?" He said, "You get the idea."

Tr. 274-75.

In the fall of 1970, following the Daniels conversation, Yapp called Mulvehill and offered to buy Monsanto herbicides. (Tr. 290, 858-62) Mulvehill testified: "I immediately got sort of a little sick feeling in my stomach because I knew I couldn't sell him or didn't think I was going to be able to do it and get away with it." (Tr. 290-91) Mulvehill stalled until he could meet with Albertson, Monsanto's district manager:

> And either the Friday or the Thursday before the closing date of that order, Max [Albertson] was in fact in my office and I did ask him if I could make that sale to Don Yapp. I said, "I have it in hand here. He's called. He'd done everything possible to buy this stuff from me," and he said, "No, don't make that sale. He's [illegible]ody that we don't want you to sell to. And besid[illegible]'s out of your territory."

Tr. 292. Mulvehill declined the sale even though Spray-Rite offered to raise the purchase price. (Tr. 293-295) Mulvehill explained his reasoning in trying to "play their game":

> If I had not had the fear of getting in trouble with Monsanto, I would have done it.

Tr. 295.

REASONS FOR DENIAL OF THE WRIT

Monsanto's Petition is nothing more than a jury argument on carefully selected facts believed helpful to it. That stage of the case is long past, and such reargument is clearly inappropriate in this Court. The jury decided that Spray-Rite's facts (not "allegations") overcame Monsanto's claims, and both the district court and the Seventh Circuit agreed. As Mr. Justice Holmes declared in *United States* v. *Johnson,* 268 U.S. 220, 227 (1925):

> We do not grant a certiorari to review evidence and discuss specific facts.

Moreover, the Court this term denied *certiorari* in *Schwimmer* v. *Sony Corp of America* and *Venture Technology, Inc.* v. *National Fuel Gas Distrib. Corp.,* 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982) (Nos. 82-277, 82-362) (White, J., dissenting), in which the writs were sought on the basis of asserted conflict between these Second Circuit decisions and the Seventh Circuit's decision here. Monsanto presents the same point, but with even less merit, since it virtually admits that the jury was correct in finding a post-termination conspiracy to boycott Spray-Rite. Pet. at n.4. It strains credibility to believe that the *coup de grace* of the boycott was the beginning rather than the culmination of the price-fixing conspiracy.

By the same token, the presence of this boycott conspiracy sets this case apart from all of the cases relied upon by Monsanto. It overrides any conflict in the circuits which

Justice White perceived and colors all of Monsanto's actions.[7]

I. THE COURT OF APPEALS APPLIED THE CORRECT LEGAL STANDARDS IN REVIEWING THE TRIAL EVIDENCE AND JURY VERDICT

In reviewing the trial evidence and jury verdict, the Seventh Circuit held that it "must weigh conflicting evidence and inferences most favorably to the prevailing party," and that it must affirm "[i]f there is any substantial evidence in the record to support the jury's verdict." App. at A-14. These appellate standards comport with the decisions of this Court. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Brady* v. *Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).

II. PETITIONER'S POINT I DISTORTS THE SEVENTH CIRCUIT'S HOLDING AND IS NOTHING MORE THAN A REARGUMENT OF THE SUFFICIENCY OF THE EVIDENCE

When the history of petitioner's Point I is examined, it is apparent that Monsanto has distorted the Seventh Circuit's holding and changed its theory in an attempt to obscure an inopportune reargument of the sufficiency of the evidence.

Monsanto did not object to the following trial court instruction:

> It is also per se illegal for a manufacturer to utilize customer or territorial restrictions pursuant to or as a part of, a comprehensive price-fixing plan or an agreed refusal to deal. Therefore, if you find that the defendant conspired or combined with one or more of its distrib-

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[7] *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) ("plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each.")

> utors to utilize the defendant's customer or territorial restraints in order to effectuate price stabilization or resale price maintenance, or to detect and prevent resale price-cutting, or to effectuate any restriction on plaintiff's access to defendant's products, then the defendant has violated Section 1 of the Sherman Act.

Tr. 4356. In fact, Monsanto's counsel (1) specifically suggested the phrase "pursuant to" (Tr. 4055: "I just think 'pursuant to' is the law."); (2) conceded that it is per se illegal to use customer and territorial restraints pursuant to a price-fixing conspiracy (Tr. 4054: "I would say it is also per se illegal for a manufacturer to utilize customer *or* territorial restrictions pursuant to a price-fixing conspiracy or agreement." (Emphasis added)); (3) suggested that "ancillary to" and "pursuant to" are interchangeable (Tr. 4056: 'I think when the seventh circuit has spoken of ancillary to, it means the same thing as pursuant to.") and (4) flatly admitted "that if you conspire to use restraints with distributors to effectuate price-fixing it is illegal." (Tr. 4058)[8] The jury, in answering Special Interrogatory No. 2, specifically found that Monsanto's programs and policies were part of a price-fixing conspiracy.

On appeal, Monsanto flatly argued that "programs and policies such as Monsanto's cannot be *per se* violations." Br.

[8] As observed by the Seventh Circuit (App. at A-11 n.5), the trial court also included the following instructions requested by Monsanto regarding this issue:

> The fact that a program may have an effect on prices, even raising them, does not mean that it is part of a price-fixing plan. Imposing normal competitive requirements on a distributor, such as encouraging a distributor to advertise, may affect the distributor's costs, thereby indirectly affecting the price at which the distributor will sell the product. That does not necessarily mean that those requirements are part of a price-fixing conspiracy or combination, although you may find that they are part of a conspiracy or combination.

at 29. The Seventh Circuit, despite having before it Spray-Rite's claim that Monsanto had waived any objection to the trial court's instruction, passed over the waiver question and decided the issue on the merits. It is critical to note that the Seventh Circuit's discussion of this issue appears in the section of the opinion dealing with Monsanto's challenges to the trial court's instructions (App. at A5-13) and not in the section on Monsanto's claims regarding the sufficiency of the evidence. App. at A-13 *et seq.* The court of appeals described Monsanto's argument as follows:

> Monsanto contends that the instructions concerning Monsanto's compensation programs and shipping polices were erroneous. The court instructed the jury that it is per se unlawful for a manufacturer to utilize customer or territorial restrictions as part of a comprehensive price-fixing plan or boycott. Monsanto claims that the court should have instructed the jury to determine the lawfulness of its compensation programs and shipping policies pursuant to the rule of reason rather than the per se rule.

(footnote continued)

Defendant has the right to assign distributors to areas of primary responsibility and to assign points where distributors can pick up products or take delivery, so long as the decision to do these things is independent and not because of a price-fixing conspiracy or combination.

* * *

The fact that some of Monsanto's policies may have affected the price paid by all non-contract sellers, including plaintiff, does not necessarily establish a conspiracy, but may be evidence which you can consider along with all the other evidence in the case in deciding whether a conspiracy existed.

Defendant has the right to implement incentive programs in order to encourage its distributor to perform certain marketing functions unless those programs are part of a price-fixing conspiracy or combination.

Tr. 4364-65.

App. at A11-12. The Seventh Circuit then stated that Monsanto's reliance on *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) was misplaced, and held that this instruction issue was governed by this Court's decisions in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), *White Motor Co.* v. *United States*, 372 U.S. 253, 260 (1963) and *United States* v. *General Motors Corp.*, 384 U.S. 127, 142 (1966). The appellate court found that the trial court's instruction on this issue was accurate, and it distinguished cases cited by Monsanto where either the plaintiff "failed to allege that the distributors' territorial restrictions were ancillary to a per se unlawful price-fixing scheme," or "plaintiff had failed to prove the existence of a price-fixing conspiracy." App. at A-13 n.6.[9] Therefore, a fair reading of the Seventh Circuit's holding on this *jury instruction issue* is simply that it is proper for the trial court to give a per se instruction if, and only if, a per se violation is properly alleged in plaintiff's complaint and there is enough evidence or proof to justify going to the jury on that issue.

The trial court's instruction was clearly proper under the language of this Court's decisions in *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 720 (1944), *White Motor Co.* v. *United States*, 372 U.S. 253, 260 (1963), *United States* v. *Sealy, Inc.*, 388 U.S. 350, 357-58 (1967) and *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365, 375-76 (1967). As the majority in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977) pointed out:

> Most important was the jury's rejection of the allegation that the location restrictions were part of a larger scheme to fix prices.

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[9] Interestingly, Monsanto points out that the appellate court distinguished other decisions where the plaintiff "*failed to allege*" a per se violation (Pet. at A-11 n.9), but it neglects to mention that the court also distinguished in the same footnote a case where the plaintiff *failed to prove* the conspiracy. *See* App. at A-13 n.6.

433 U.S. at 41 n.49. Moreover, the Seventh Circuit's holding regarding this instruction comports with other appellate and district court decisions considering such ancillary restrictions pursuant to a price-fixing conspiracy. *See, e.g., Ohio-Sealy Mattress Mfg. Co.* v. *Sealy, Inc.*, 585 F.2d 821, 827 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *General Beverage Sales Co.* v. *East-Side Winery*, 568 F.2d 1147, 1153 (7th Cir. 1978); *Blankenship* v. *Hearst Corp.*, 519 F.2d 418, 424 (9th Cir. 1975); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 506 F.2d 934, 942-48 (5th Cir. 1975);[10] *Worthen Bank & Trust Co.* v. *National BankAmericard, Inc.*, 485 F.2d 119, 130 (8th Cir. 1973), *cert. denied*, 415 U.S. 918 (1974); *Pitchford Scientific Instr. Corp.* v. *Pepi, Inc.*, 435 F.Supp. 685, 689 (W.D. Pa. 1977), *affd. mem.*, 582 F.2d 1275 (3d Cir. 1978), *cert. denied*, 440 U.S. 981 (1979); *Interphoto Corp.* v. *Minolta Corp.*, 295 F.Supp. 711, 720 n.4 (S.D.N.Y.), *aff'd*, 417 F.2d 621 (2d Cir. 1969); *R. E. Spriggs Co., Inc.* v. *Adolph Coors Co.*, 1979-2 Trade Cases ¶ 62,764 at 78,396 (Cal.App.Ct.), *cert. denied*, 444 U.S. 1076 (1980).

Apparently recognizing that it cannot conceal its waiver or distinguish all of the above precedent, Monsanto now concocts its "mere incantation" or "base allegation" strawman. *See* Pet. at 5, 11 *et seq.* In order to pursue this argument, however, Monsanto must take the Seventh Circuit's language totally out of context and ignore completely the procedural posture of the issue before that court. Such a contortion is hardly persuasive.

That attempt failing, Monsanto inopportunely changes its theory and now argues to this Court that "[i]n contrast

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[10] In *GTE Sylvania, Inc.* v. *Continental T.V., Inc.*, 537 F.2d 980, 992 n.18 (9th Cir. 1976), the Ninth Circuit distinguished *Copper Liquor* as dealing with "territorial restraints . . . utilized to effect vertical price fixing—a clear *per se* violation by whatever means it is achieved."

to those cases where non-price restrictions were condemned as ancillary to price-fixing, there is no evidence in this case that Monsanto's programs and policies were adopted or employed with the intent or effect of fixing resale prices." Pet. at 17. The jury obviously disagreed, and the Seventh Circuit, after reviewing the entire record, affirmed the jury's finding.[11] In any event, this Court should not conduct another factual review.

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[11] Monsanto again stoops to twisting the record. An example is Monsanto's claim that its products were, "virtually without exception," in ample supply. Pet. at 17-18 n.20. This claim is refuted by Monsanto's own documents, a glaring instance being a Prospective Distributor Review prepared in 1969 by Thomas Dille, a Monsanto district manager:

> My greatest need is in northern Illinois [Spray-Rite's area], where we missed some sales this year because there was no product on the shelves.

PX. 279. Another Monsanto official described as follows the 1969 market for Monsanto's Lasso, its newest and most advanced product:

> [I]t was a new product which was *short*, there was a big demand for it, and we felt that we should be able to hold the price on that product . . . , stabilize the price at the market place.

Tr. 1929 (Emphasis added). Of course, this was somewhat academic to Spray-Rite, who, because of the boycott, was unable to obtain any Lasso in 1969. Tr. 793.

The most flagrant record distortion goes to the very heart of Monsanto's claim that there was no evidence linking Monsanto's programs and policies with the price-fixing conspiracy. Pet. at 16. Respondent will not burden the Court with a lengthy recital of the testimony and documents establishing this link for each program and policy, but will instead provide just a few examples regarding one such policy—Monsanto's areas of primary responsibility. Start with the testimony of Monsanto's Emmett McCormick, who stated that areas of primary responsibility were employed by Monsanto "to limit this competition amongst the distributors, and in turn, limit the price cutting . . . [and] stabilize the market." Tr. 1936-37.

III. PETITIONER'S POINT II, ALSO A BELATED REARGUMENT OF THE SUFFICIENCY OF THE EVIDENCE, DISREGARDS THE PER SE GROUP BOYCOTT, MISSTATES THE STANDARD APPLIED BY THE SEVENTH CIRCUIT AND DISTORTS THE TRIAL RECORD

Petitioner's Point II, another belated attempt at rearguing the sufficiency of the evidence, is without merit, since it totally disregards the per se group boycott, misstates the standard applied by the Seventh Circuit and distorts or ignores dispositive facts.

It cannot be over-emphasized that the per se group boycott in this case sets it apart from all of the cases relied upon by petitioner. Monsanto virtually admits that it conspired with its distributors to boycott Spray-Rite, and this admission is justified by the *uncontradicted* evidence.

(footnote continued)

Robert Schweikher, Monsanto's regional manager, told John Mulvehill of Midstate Chemical:

> And, really, John, it's all quite good for you. If you maintain the prices, and we don't get into a big price war out here with each other, if you have a profitable business, you are going to be happy and we're going to be happy. Now the way that is done by [sic] giving people certain pieces of geography to work in and to stay in. Now you play our ball game and we're going to get along just fine.

Tr. 320. McCormick likewise told Mulvehill: "We are trying to get a stable market, and the reason why we are limiting you to certain states is so we could stabilize the market." Tr. 1983. Finally, there is the classic statement by Albertson in forbidding Mulvehill to sell Spray-Rite (*see* p. 11, *supra*):

> No, don't make that sale. He's somebody [a price-cutter] that we don't want you to sell to. And besides he's out of your territory.

Tr. 292. Given such evidence, which is certainly more than a "mere incantation" or "bare allegation," it is not difficult to understand why the jury found as it did.

See pp. 10-12, *supra*. The boycott by Monsanto and Spray-Rite's competitors is precisely the pernicious conduct condemned in *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) and *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966). It does not promote interbrand or intrabrand competition, and its only purpose is to restrict competition. Even ignoring the overwhelming evidence of a resale price maintenance conspiracy, the boycott alone requires rejection of petitioner's Point II and denial of the writ.

Conceding the boycott in the hope of burying its undeniable evidence, Monsanto ignores the procedural history of the conspiracy question and proceeds along the following tortuous path: (1) the construction of a hypothetical summary of the evidence totally unrelated to the actual facts; (2) a distortion of the Seventh Circuit's holding; (3) an abstract exposition on free-riders; (4) an ever-changing claim of conflict in the circuits; and (5) a belated reargument of the facts.

The jury, in answering Special Interrogatory No. 1 which was requested and worded by Monsanto, specifically found that Spray-Rite was terminated "*pursuant to* a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto's herbicides."[12] Tr., Feb. 21, 1980, p. 2 (Emphasis added) The jury was extensively instructed regarding the conspiracy

[12] Monsanto did not object to the trial court's per se instruction regarding resale price maintenance (Tr. 4053), and it raises no question regarding it in the Petition. In *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), this Court stated that its holding was limited to "non-price vertical restrictions" and noted that "[t]he per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." 433 U.S. at 51 n.18.

question and told that Spray-Rite had the burden of demonstrating "agreement," "mutual understanding," "knowing participation," and a "commitment" to "a common and unlawful plan."[13] Tr. 4349-53. The court of appeals, "[a]fter carefully reviewing the entire jury charge," held that "the instructions in this case were proper." App. at A-5.

The Seventh Circuit also held that "[t]here was sufficient evidence to support the jury's verdict that Monsanto terminated Spray-Rite *pursuant to* a conspiracy with other distributors to fix the resale price of Monsanto herbicides." App. at A-17 (Emphasis added). Stating that Spray-Rite was required to prove "termination *in response to* competing distributors' complaints about . . . [Spray-Rite's] pricing policies," the court found this burden satisfied and cited several examples of the conspiracy proof. *Id.* at A-16 (Emphasis added).[14] The Second Circuit's decision in *H. L.*

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[13] The trial court also gave the following instruction submitted by Monsanto:

> The fact that distributors complain about prices or anything else does not in itself mean that a conspiracy existed. Even if you find that Monsanto acted in exactly the way that complainants would have wished, that does not prove the existence of a conspiracy. . . .

Tr. 4354.

[14] The Seventh Circuit did not need to pass upon Spray-Rite's alternate theory and evidence of combination:

> Because we hold that Spray-Rite presented sufficient evidence to support the jury's verdict on its theory that Monsanto terminated the Spray-Rite distributorship pursuant to a resale price maintenance agreement between Monsanto and some of its distributors, we need not decide whether Spray-Rite presented evidence to support a verdict based on the theory that Monsanto effectuated its resale price maintenance scheme by coercing distributors into adhering to Monsanto's suggested resale price.

App. at 17 n. 9. Respondent's summary of the conspiracy evidence does not purport to include the extensive evidence of such coercion.

Moore Drug Exchange v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, 51 U.S.L.W. 3258 (U.S. Oct. 5, 1982) (No. 81-2215), was distinguished on the ground that "[t]he plaintiff [there] simply failed to adduce sufficient evidence of a conspiracy to terminate its distributorship." App. at 17 n.8. The only conspiracy evidence in *Moore* was "a price complaint from one distributor," while in this case "we have evidence of many complaints *coupled with* evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite." *Id.* (Emphasis added)

In devising Point II, Monsanto impermissibly isolates three[15] elements of the conspiracy evidence and argues that these three elements are not enough. Thus phrased, the issue is purely hypothetical, since the conspiracy evidence far exceeds complaints by competing distributors, Monsanto's concern over resale prices and Spray-Rite's termination. The record demonstrates not only those three elements, but also a pervasive, conspiratorial system of

[15] While the Petition isolates only *three* elements, Monsanto was a little more forthright in its main brief in the Seventh Circuit, where it admitted: (1) that "the [Monsanto] employees who decided not to renew Spray-Rite were aware of these [distributor] complaints" (Monsanto Br. at 50); (2) that it was concerned about the prices charged by its distributors (*id.* at 52); (3) that "[d]istrict sales managers and field salesmen were . . . aware of the price in the market and discussed resale prices with a number of distributors" (*id.*); (4) that Monsanto made "inquiries about price" (*id.* at 56); (5) that Monsanto made "occasional inquiries about Spray-Rite's prices" and sent Spray-Rite a suggested price list; and (6) that distributor John Mulvehill "testified he had been threatened with termination by Monsanto if he did not get his prices up. . . ." (*id.* at 55). Monsanto then cavalierly claimed that "even if those actions [inquiries about Spray-Rite's prices and sending it a price list] were taken *in response to* competitors' complaints, [they] are . . . not evidence of a conspiracy with other distributors." *Id.* at 52. (Emphasis added)

monitoring, investigation, policing, threats, coercion, and eventual termination. When coupled with what the Seventh Circuit describes as "evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite," this is the classic resale price maintenance scheme condemned in *United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960):

> The Sherman Act forbids combinations of traders to suppress competition. When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . , he has put together a combination in violation of the Sherman Act.

362 U.S. at 44. *Accord, Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

Monsanto again distorts the Seventh Circuit's opinion by claiming, for example, that it "ignored that a manufacturer legitimately may be concerned that distributor price-cutting will undermine its marketing strategy and unilaterally may terminate a price-cutter for that reason." Pet. at 22. Contrary to Monsanto's claim, the Seventh Circuit, citing *United States* v. *Colgate*, 250 U.S. 300 (1919), expressly recognized that "[a] manufacturer may unilaterally fix a suggested resale price for its product" and "may also lawfully refuse to deal with any distributor that resells the product at a price other than that it has suggested." App. at A-6. In any event, the issue is not whether the Seventh Circuit expressly considered every factual or legal claim raised by Monsanto, but whether the jury was properly instructed on the conspiracy question and whether there was evidence to support its finding. The Seventh Circuit considered that issue and affirmed. There is no need for further review by this Court.

Monsanto then advances an abstract discussion of the "free-rider problem." Pet. at 22-24,28. This discussion is totally in the abstract, since Monsanto cannot in good faith contend that Spray-Rite was in fact a free-rider. The record demonstrates beyond question that Spray-Rite provided extensive pre-sale, point-of-sale and post-sale services. *See* p. 4 *supra*. Spray-Rite was not a free-rider in any sense of that term, and the distributor complaints were about its prices and not its lack of service.

Monsanto claims that there is a conflict in the circuits regarding the conspiracy question, but it is unable to make up its mind regarding the participants in this alleged conflict. In its petition for rehearing before the Seventh Circuit, Monsanto argued that "[t]he Spray-Rite decision *stands alone*," that the panel here "misapplied" *Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982), and that this decision conflicts with decisions from the Second, Third, *Eighth* and Ninth Circuits. Pet. for Rehearing at 1, 3, 5 (Emphasis added.) Monsanto now claims that the conflict is between the Seventh and Eighth Circuits on one side, and the First, Second, Third, Sixth and Ninth Circuits on the other. Pet. at 24-25. It glosses over the fact that the conspiracy evidence in this case, even excluding the boycott, meets and exceeds the standards enunciated by all these circuits. As the government declared in its amicus brief in *Battle*, "[t]he evidence adduced in *Spray-Rite* is easily distinguished from that adduced in *Battle*." Brief of the United States as Amicus Curiae on Rehearing En Banc at 7 n.6.

Finally, Monsanto makes a last-ditch attempt[16] at rearguing the "important . . . evidence" which the Seventh Circuit allegedly ignored and concludes Point II with the declaration that "[t]he issue before the Seventh Circuit was . . . whether the conspiracy issue should have gone to the jury at all." Pet. at 26-28. The Seventh Circuit decided that issue, and Monsanto has certainly had its day in court.

[16] Monsanto's belated reargument is peppered with the usual record distortions. It claims, for example, that the "market [is] characterized by vigorous interbrand . . . competition." Pet. at 28. This statement flies in the face of its own "Business Plan" which declares that the market consists of "compounds which are the patented property of a handful of large companies" and which recognizes "[t]he proprietary nature of these compounds and their varying levels of activity and selectivity. . . ." PX. 139. Such a market is hardly a hotbed of interbrand competition.

A second instance is Monsanto's claim that "the final price complaint about respondent occurred more than one year before its non-renewal." Pet. at 27. Monsanto glosses over district manager Bone's visit six months prior to termination during which he asked about Spray-Rite's price to Meiers, Inc. on Ramrod 20-G and flatly threatened that if Spray-Rite did not follow Monsanto's suggested prices, "retaliation was going to take place." *See* p.8, *supra*. Monsanto carried out that threat at the next opportunity.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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January 6, 1983

COMMENTS REGARDING THE GOVERNMENT'S AMICUS BRIEF

On December 29, 1982, the government first informed respondent that it was filing an amicus brief in this matter, and respondent's counsel of record received that brief on January 4, 1983. There is, therefore, no time or necessity to respond in detail to the government's brief, which does nothing more than mouth Monsanto's platitudes and record distortions.

Nonetheless, respondent has the following brief comments regarding this rather unusual document:

1. Like Monsanto, the government would have the Court ignore the uncontradicted evidence of a conspiratorial boycott ("we will not discuss that issue here"). Amicus Br. at 5 n.5. That evidence, of course, distinguishes this case from all the cases cited by the government.

2. The government notes that it filed an amicus brief in the *Battle* rehearing en banc before the Eighth Circuit, but it does not even attempt to explain its statements in that brief that *Battle* "contains no evidence of causality," and that "the evidence adduced in *Spray-Rite* is easily distinguished from that adduced in *Battle* . . . ." Br. at 7 n.6.

3. The government cites and relies extensively upon *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742 (1982). It neglects to mention that *Valley Liquors* was cited and discussed in this opinion and that the author of this opinion was also a member of the unanimous panel in *Valley Liquors*.

4. In footnote 15, the government virtually admits that it is not interested in the facts or jury findings in this case. Amicus Br. at 10 n.15. That disdain is apparent throughout the brief.

5. It takes the government almost 13 pages to state the real reason why it filed this brief—a challenge to over 70 years of this Court's precedent* holding vertical price-fixing or resale price maintenance per se illegal. Amicus Br. at 13. The present theoreticians of the Justice Department would rise above all that and debate their theories in a vacuum. Respondent suggests that if these zealots want to overturn this precedent and weaken the Sherman Act, they should petition the Congress, rather than file an amicus brief in the Court.

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* The government repeatedly discusses and relies upon *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), but it passes over the Court's statement that "[t]he per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy." 433 U.S. at 51 n.18.

No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Petition For a Writ of Certiorari To The United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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REPLY BRIEF IN SUPPORT OF PETITION[1]

The amicus brief filed by the Solicitor General in support of Monsanto's petition confirms the importance of the two antitrust issues presented by the petition. As the Solicitor General states, the Seventh Circuit's decision condemning Monsanto's non-price practices as *per se* unlawful "undermines the distinction made in *Sylvania* between price and non-price vertical restrictions and threatens to stifle many types of procompetitive non-price actions taken by manufacturers in order to stimulate interbrand competition." (Amicus Brief at 10-11.)

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[1] The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28 appears at page ii of the petition. There have been no changes to the parties in the interim.

Likewise, as the Solicitor General states, "[t]he decision below conflicts with decisions of four other courts of appeals. . . ." on whether a vertical price-fixing conspiracy can be inferred solely from evidence of price complaints and termination. (*Id.* at 5.) Its effect "is to undermine Section 1's crucial distinction between collective and unilateral conduct . . . and the rule below would significantly impede independent, procompetitive conduct."[2] (*Id.* at 7.)

Respondent's brief does not address the questions presented by the petition and joined in by the Solicitor General: whether the Seventh Circuit applied two incorrect *per se* standards in sustaining the jury verdict. Respondent neither defends the standards applied by the court of appeals nor denies the direct conflict in the circuits on the conspiracy rule. It thus begs the questions presented for review and ignores the serious implications of the Seventh Circuit's decision for antitrust policy and its chilling effect on procompetitive business conduct.[3]

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[2] The importance of the second issue is further demonstrated by the filing of at least four other petitions for certiorari raising that issue this Term. *See H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S. Ct. 176 (1982); *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982), *petition for reh'g filed*, Jan. 3, 1983; *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, 685 F.2d 41 (2d Cir. 1982), *cert. denied*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982), *petition for reh'g filed*, Dec. 3, 1982; *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (U.S. Nov. 19, 1982). This conflict is ripe for review.

[3] A substantial portion of respondent's brief is devoted to the post-termination boycott claim, which Monsanto has not raised in this Court. Respondent does not contend that this claim, standing alone, is sufficient to sustain the jury's verdict or the damage award. It cannot so argue because its theories of both antitrust injury and damages were predicated upon the combined effect of its termination, Monsanto's non-price programs and policies and the alleged group boycott. Because of its

(footnote continued on next page)

POINT I: Contrary to *Sylvania*, the Seventh Circuit applied a per se rule to Monsanto's non-price practices based on a mere allegation, not proof, of a linkage to price-fixing.

The Seventh Circuit squarely held that *Sylvania*[4] "applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices," and that "*Sealy* and its progeny prescribe the per se rule" when such an allegation is made. (App. A-12.) As the Solicitor General notes, "the court of appeals' analysis, on its stated terms, found the allegation itself to be dispositive. Thus, the court expressly linked the invocation of a per se approach to respondent's allegations and not to the proof adduced at trial." (Amicus Brief at 10-11 n.15)(citations omitted).

Respondent does not defend that standard, endeavoring instead to rewrite the decision to include a requirement, not expressed by the court of appeals, that there be sufficient evidence to justify submitting the issue to the jury. The court intended no such requirement, as is confirmed by its failure to analyze whether there was any evidence linking Monsanto's non-price practices to the alleged price-fixing.[5]

(footnote continued from preceding page)

aggregate damage theory and the nature of its damage evidence, *see* Pet. at 3 n.4, 10 n.8; Amicus Brief at 5 n.5, a reversal on either of the issues presented for review would require a new trial.

[4] *Continental T.V., Inc.* v. *GTE Sylvania* Inc., 433 U.S. 36 (1977).

[5] Respondent's comment that Monsanto waived objection to the jury instruction on this issue misses the point. Monsanto does not challenge the correctness of the instruction. Rather, Monsanto's position at trial, on appeal and in its petition has been that it was entitled to a directed verdict based on the lack of evidence linking the non-price practices to the alleged price-fixing conspiracy. Monsanto thus does not disagree with the cases cited in respondent's brief at 16-17 (hereinafter "Resp. Brief"), all of which require such evidence of linkage before a *per se* rule may be applied.

The court of appeals declined to consider that issue and did not sustain the verdict on that ground.

Even were the decision to be read as respondent suggests, the record contains no evidence that would have permitted the jury to link the non-price programs to alleged price-fixing. Respondent presented no evidence at trial explaining how Monsanto's practices (including compensation payments to distributors for technical education and promoting sales to dealers) supported, or could have any rational connection to, resale price maintenance. (Pet. at 17-19.)

The sole evidence cited by respondent as establishing the essential link is testimony purporting to show that Monsanto's assignment of distributors to areas of primary responsibility tended to limit competition, including price competition, among distributors. This sort of indirect effect on price competition does not constitute unlawful price-fixing. As this Court recognized in *Sylvania*, non-price vertical restrictions may well have such an indirect effect on the level of intrabrand price competition, *see* 433 U.S. at 54, but are not therefore condemned under a *per se* rule. *Cf. Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 23 (1979). The argument that an indirect effect on price establishes a link to price-fixing is particularly fallacious in this case because Monsanto assigned 10 to 20 distributors to each area of primary responsibility.[6]

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[6] Respondent has not disputed that Monsanto distributors sold substantial amounts of Monsanto's product outside their primary areas. (Pet. at 18.) Notwithstanding respondent's present position (Resp. Brief at 25 n.16), respondent's owner testified at trial that there was always vigorous competition (Tr. 1182-85; *see also* Tr. 692-93, 1179, 1323), and its economic expert agreed that the industry "was a highly competitive industry" (Tr. 2990).

POINT II: Respondent does not dispute the "unmistakable" conflict created by the Seventh Circuit's decision on the conspiracy standard.

The second issue presented by the petition is whether the conspiracy rule applied by the Seventh Circuit, which conflicts with the standard adopted by other circuits, is correct. The Seventh Circuit held that respondent proved a *per se* unlawful price-fixing conspiracy based solely on evidence that Monsanto, concerned about its distributors' resale prices, received price complaints from other distributors and later declined to renew respondent. (App. A-15 to 16.) In so holding, the court created an "unmistakable", continuing conflict among the circuits.[7]

Respondent does not attempt to analyze this conflict, nor does it defend the Seventh Circuit's divergent legal standard. It thus ignores the question presented for review by Monsanto and the Solicitor General. Instead, respondent's brief is devoted to a lengthy discussion of evidence, important elements of which were ruled inadmissible.[8] Most of the admissible evidence relates to price complaints and price concern, which other courts of appeals have held inadequate to prove a conspiracy.

The remainder of the evidence recited by respondent relates to an alleged post-termination boycott and is beside the point. First, the court of appeals' conspiracy holding was based solely on evidence of price complaints, price concern and subsequent non-renewal. Second, as a matter of law, this boycott evidence is not probative of an earlier non-renewal pursuant to an alleged price-fixing conspiracy.

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[7] *Schwimmer* v. *Sony Corp. of America*, 51 U.S.L.W. 3362 (U.S. Nov. 9, 1982), *petition for reh'g filed*, Jan. 3, 1983 (White J., citing *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226 (7th Cir. 1982), in dissenting from denial of certiorari).

[8] *Compare* Resp. Brief discussing Laverty testimony at 2 n.2 *with* App. A-28; *compare* Resp. Brief discussing Yapp testimony at 9 *with* Tr. 772, 1295.

Respondent's brief emphasizes the evidence relating to its price-cutting, the frequent complaints to Monsanto concerning that price-cutting, and Monsanto's concern about resale prices. (Resp. Brief at 5-6.) As the petition demonstrates, such complaints and price concerns are competitive facts of life. They are no more probative of conspiracy than of lawful unilateral conduct based upon legitimate economic self-interest. (Pet. at 22-26.)[9] Respondent does not dispute that it had a long history as a price-cutter, that after the last complaint (fifteen months prior to non-renewal) respondent's distributorship was renewed, and that it subsequently failed to satisfy Monsanto's newly-announced renewal criteria. Nor does it dispute that neither it nor any other distributor ever acquiesced in Monsanto's suggestions regarding resale prices, notwithstanding any alleged termination threats by Monsanto. (Resp. Brief at 7, 8, 21 n.14.)

Lacking evidence that Monsanto did not act unilaterally, respondent recites evidence of the alleged subsequent post-termination boycott. Notwithstanding respondent's speculation to the contrary, such evidence is not probative of non-renewal pursuant to a price-fixing conspiracy. *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 857 (1st Cir. 1982) (evidence of "subsequent enforced prevention of [plaintiff's] purchasing defendant's goods from other dealers" amounting to a group boycott after termination does not support a

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[9] Respondent implies that a telephone call between it and Monsanto some six months before termination suggests that the call must have been motivated by price complaints. (Resp. Brief at 8.) The fact that the call occurred nine months after the last complaint negates any inference that the call was motivated by a complaint. Other claimed conspiracy evidence is of a like vein. For example, respondent observes that Monsanto employees, both in the home office and in the field, were aware of its price-cutting, that Monsanto made inquiries about resale prices, and that it was concerned about resale price levels in the marketplace. (Resp. Brief at 5 n.4, 9 n.5, 22 n.15.) This evidence shows only a manufacturer's normal interest in resale prices.

"finding of a concerted termination of [plaintiff's] dealership . . . ."). Moreover, the conspiracy rule applied by the Seventh Circuit, which focuses purely on the events leading up to termination, does not encompass such evidence. And while respondent argues that the boycott verdict distinguishes this case from those decisions in conflict with the Seventh Circuit, it never explains how the evidence of a later boycott is probative of an earlier price-fixing conspiracy. Respondent tried the case and the Seventh Circuit reviewed it on the theory that the termination was the product of a conspiracy, not the beginning of one.

CONCLUSION

The Seventh Circuit's decision "threatens to chill the efforts of manufacturers to implement numerous procompetitive vertical marketing decisions that, under *Sylvania*, should be entitled to rule of reason analysis instead of per se condemnation." (Amicus Brief at 13.) Similarly, "in practical effect, the Seventh Circuit's [conspiracy] rule could virtually immunize dealers from termination once a competitor has complained." (*Id.* at 9.)

If permitted to stand, the decision below will deter any manufacturer from implementing procompetitive marketing strategies requiring promotional activities by distributors. This case illustrates that risk. Here, a toehold supplier, confronted by an entrenched, dominant competitor adopted innovative marketing programs which the Solicitor General describes as "precisely the type of practices identified in *Sylvania* as likely to have procompetitive effects. . . ." (Amicus Brief at 12.) These programs were successful, and the market became less concentrated. Nevertheless, a distributor who refused to follow Monsanto's marketing programs and was not renewed was awarded over $10 million in damages based on the illegality of these demonstrably procompetitive programs.

This case presents the Court with an appropriate opportunity to define proper legal standards on two clearly-presented issues of antitrust law and thereby foster the use of innovative non-price programs enhancing competition. We respectfully submit that the petition should be granted.

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NOTICE:

THE FOLLOWING MOTION TO FILE AN AMICUS BRIEF OUT-OF-TIME WAS DENIED BY THE COURT ON MARCH 7, 1983 (51 LW 3649), BUT IS REPRODUCED HEREIN IN THE INTEREST OF COMPLETENESS.

No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION

Respondent.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Seventh Circuit

MOTION BY THIRTY-NINE STATES AS AMICUS CURIAE FOR LEAVE TO FILE OUT OF TIME AMICUS BRIEF OPPOSING CERTIORARI

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MOTION BY THIRTY-NINE STATES
AS AMICUS CURIAE FOR LEAVE TO FILE
OUT OF TIME AMICUS BRIEF OPPOSING
CERTIORARI

As instructed by the Clerk of the Court, the Attorneys General of the thirty nine states on whose behalf the Brief For Thirty Nine States As Amicus Curiae is herewith presented for filing hereby move for an extension of time within which to file the brief. The Amici States believe that an extension is justified under the circumstances of this proceeding for the reasons set forth below.

The Attorneys General of the Amici States are the chief law enforcement officers of their respective jurisdictions, and are charged by law with responsibility for the enforcement of state and federal antitrust laws. Because of their major enforcement

responsibilities, the Amici States have a substantial interest in the application and interpretation of the antitrust laws in a manner consistent with the Supreme Court's numerous decisions with respect thereto. Consequently, the Amici States were alarmed upon discovering on January 27, 1983, that the United States, in its amicus brief in support of Monsanto's petition for certiorari, proposed major revisions of the antitrust laws with respect to activities which have been regularly condemned by the Court as per se violations of the Sherman Act for over 70 years. The Amici States consider the respective contentions of Monsanto and the United States antithetical to effective enforcement of the antitrust laws, and inimical to numerous pending cases and investigations. In short, the amicus brief of the United States reflects profound differences between the

United States and the Amici States on basic antitrust policy, and proposes major revisions to the antitrust laws with which the Amici States disagree entirely.

Upon learning the nature of the United States' participation in this proceeding in support of Monsanto, the Amici States acted promptly and diligently in the preparation of the amicus brief. The undersigned counsel of record first learned of the filing of the United States' amicus brief on January 19, 1983. A copy of the brief was requested on January 20, and was received on January 27. A draft of the enclosed amicus brief was circulated to all states on February 9, and the final additions as amici were made on February 15. Circulation of the draft brief, and the completion of the states' internal administrative clearance procedures

necessary for participation on the brief, were slowed as a result of certain states' scheduling of a holiday in observance of Lincoln's birthday.

Although mindful of the fact that the prescribed period for the submission of an amicus brief has passed (Spray-Rite's opposition to the petition was filed on January 6; the amicus brief of the United States was filed on January 3), the Amici States believe that the Court should be apprised of their views regarding the petition and the position of the United States as an amicus. The participation of thirty nine states on the accelerated basis described above relects the magnitude of their concern regarding the respective positions of Monsanto and the United States herein,

and the adverse impact which those positions will have upon effective enforcement of the antitrust laws if accepted.

DATED: February 17, 1983.

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No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION

Respondent.

On Petition For A Writ Of Certiorari
To the United States Court Of Appeals
For the Seventh Circuit

BRIEF FOR THIRTY-NINE STATES AS AMICUS CURIAE

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QUESTION PRESENTED

This distributor termination case presents a simple issue, involving no conflict between the circuits:

In light of evidence establishing, *inter alia*, that Monsanto received numerous complaints from its distributors regarding Spray-Rite's price-cutting practices, and requests from those distributors that Spray-Rite be terminated because of such practices, and that Monsanto, in each of the three years preceding Spray-Rite's termination threatened Spray-Rite with termination if it did not raise its prices, and subsequently did terminate Spray-Rite because of those complaints, was the Seventh Circuit correct in affirming the jury's conclusion that Monsanto engaged in a combination and conspiracy with its distributors for the purpose of fixing the distributors' resale prices, and pursuant to that conspiracy, terminated Spray-Rite because of its price-cutting practices.

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I.
INTRODUCTION

The States of Alabama, Alaska, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, the Commonwealths of Kentucky, Massachusetts and Pennsylvania, and the District of Columbia (hereinafter the "Amici States") submit this brief in support of Respondent Spray-Rite's opposition to Monsanto's petition for a writ of certiorari.

II
IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity Of Amici States

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they are charged by law with responsibility for the enforcement of their respective states' antitrust laws, and of the federal antitrust laws.[1] In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as parens patriae on behalf of their natural citizens.[2] The Corporation Counsel for the District of Columbia has

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1 Pennsylvania does not have a state antitrust law. It does, however, play a major role in the enforcement of the federal antitrust laws.

2 15 U.S.C. § 15(c).

the same duties and authority with respect to the District of Columbia.

B. Interest Of The Amici States In This Case

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and with this Court's numerous pronouncements with respect thereto.

Moreover, the states' antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws. See, e.g., People v. North Avenue Furniture & Appliance, 645 P.2d 1291 (Colorado 1982); Neyens v. Roth, ____N.W.2d____, 1982-83; CCH Trade Cases ¶ 65,060 (Iowa 1982); Grams v. Boss, 97 Wisc.2d 332, 294 N.W.2d 473

(Wisc. 1980); Marin County Bd. of Realtors v. Palsson, 130 Cal.Rptr. 1, 549 P.2d 833 (Calif. 1976); Pittsburg Plate Glass Co. v. Paine & Nixon Co., 234 N.W. 453 (Minn. 1931).

For these reasons the Amici States are deeply troubled by the contentions of Monsanto and the United States that Monsanto's conduct did not constitute a per se violation of the Sherman Act, and, more generally, that resale price maintenance schemes generically should not be treated as per se violations. These contentions are antithetical to the Amici States' interest in the effective enforcement of the antitrust laws, and are inimical to pending cases and investigations involving resale price maintenance schemes.

III
SUMMARY OF ARGUMENT

The petition for a writ of certiorari should be denied for the following reasons:

1. There is no conflict between the circuits regarding the standard of evidence necessary to support an inference of concerted action in distributor termination cases. All of the cases relied upon by Monsanto and the United States to identify and define the conflict require, as a prerequisite to such an inference, evidence of a causal relationship between distributors' complaints about a competing distributor and a manufacturer's subsequent termination of that distributor.

2. The evidence presented at trial clearly established that Monsanto engaged in a combination and conspiracy with its

distributors for the purpose of fixing the distributors' resale prices, and, pursuant to that conspiracy, terminated Spray-Rite because of its price-cutting practices. The Seventh Circuit properly affirmed the jury's conspiracy determination, and the district court's application of per se standards to Monsanto's price fixing conduct.

3. The use of certiorari in this case for the purpose of accomplishing the major revision of the law relating to resale price maintenance conspiracies proposed by the United States would be singularly inappropriate. The United States' ambitious proposal is wholly unsupported by the the evidence, and disregards seventy years of pronouncements by this Court and the Congress recognizing the pernicious effect of resale price maintenance schemes and condemning such activities as

per se violations of the Sherman Act. Moreover, the course proposed by the United States reflects a surprising insensitivity towards the respective roles of the Judiciary and the Congress in the formulation and application of the antitrust laws.

IV
ARGUMENT

A. There Is No Conflict Between Circuits Regarding The Standard Of Evidence In Distributor Termination Cases

Contrary to the assertions by Monsanto and the United States, there is no conflict between the circuits regarding the standard of evidence necessary to support an inference of concerted action between a manufacturer and its distributors in distributor termination cases. The decisions of the seven circuits relied upon by Monsanto and the United States to identify and define the alleged conflict all require, as a prerequisite to the inference of concerted action, evidence of a causal relationship between distributors' complaints regarding a competing distributor and a manufacturer's termination of that distributor.

The Seventh Circuit's decision below,[3] and the Eighth Circuit's decision in Battle v. Lubrizol Corp.,[4] the two decisions which Monsanto and the United States treat as inconsistent with the decisions of other circuits, both require this causal relationship. The Eighth Circuit stated that:

> [W]e conclude that proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action in response to such complaints would be sufficient to raise an inference of concerted action. . . .A showing of responsive action on the part of the manufacturer is necessary; there must be evidence of a causal relationship between the competitor dealer's price-related complaints and the manufacturer's action.
>
> 673 F.2d at 991-992.

Having thus articulated the requirement of a causal relationship, the Eighth

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3 Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982).

4 673 F.2d 984 (8th Cir. 1982).

Circuit held as follows:

> We hold only that evidence of receipt by the manfacturer of a competitor dealer's price-related complaints and responsive action by the manufacturer against the offending dealer raises a reasonable inference of concerted action in violation of section 1 of the Sherman Act.
>
> 673 F.2d at 992.

In its decision below, the Seventh Circuit quoted with approval the above portion of the Eighth Circuit's Battle decision, and held:

> . . . We agree. Proof of distributorship termination in response to competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action.
>
> 684 F.2d at 1239 (emphasis added.)

Thus, the Eighth Circuit in Battle expressly equated its "responsive action" language[5] with its "causal relationship"

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5 673 F.2d at 991-992 ("in response

language.[6] The Seventh Circuit subsequently relied upon that language and adopted the Battle standard as its own. Although the Seventh Circuit did not expressly refer to a causal connection, its requirement of "[p]roof of distributorship termination in response to competing distributors' complaints" can be read in no other way. A contrary reading would place unwarranted emphasis upon a trivial semantical distinction totally lacking in substance.

These requirements of a causal relationship by the Seventh and Eighth Circuits are entirely consistent with the decisions of the First,[7] Second,[8]

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to"; "responsive action").

6 Id, at 991-992.

7 Bruce Drug, Inc. v. Hollister, Inc., 688 F.2d 853 (1st Cir. 1982).

8 H. L. Moore Drug Exchange v. Eli Lilly & Co., 662 F.2d 935 (2nd Cir. 1981); Schwimmer v. Sony Corp. of America, 677 F.2d 946 (2nd Cir.

Third,[9] Sixth,[10] and Tenth Circuits [11] upon which Monsanto and the United States rely in their effort to define a conflict. Each of these cases requires a causal relationship between distributors' complaints and a manufacturer's termination as a prerequisite to an inference of concerted action.

The Third Circuit's decision in Sweeney & Sons was the first of the "conflict decisions" to set forth the requirement of a causal relationship:

> The necessary first step toward appellants' proof of a prohibited § 1 conspiracy was proof of a causal relationship between competitor complaints that Sweeney was selling Texaco

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1982), cert. denied, 51 U.S.L.W. 3362 (Nov. 9, 1982), petition for rehearing denied, 51 U.S.L.W. 3553 (Jan.25, 1983).

9 Edward J. Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105 (3rd Cir. 1980).

10 Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190 (6th Cir. 1982).

11 Blankenship v. Herzfeld, 661 F.2d 840 (10th Cir. 1981).

> gasoline several cents below their own price and the reduction of Sweeney's hauling allowance. . . .The mere reception of complaints by Texaco would be insufficient to prove this causal _nexus_.

637 F.2d at 111 (emphasis added).

The Second Circuit's decisions in _Moore Drug Exchange_ and _Schwimmer_, while not expressly referring to a causal relationship, were nonetheless decided on those grounds. Thus, the court in _Moore Drug Exchange_ held that:

> The central issue in this case is whether Moore was terminated _pursuant to_ an illegal conspiracy between Lilly and one or more of its wholesalers to control resale prices and to restrict the territories in which Lilly products could be sold. . . . A unilateral refusal by Lilly to deal with the wholesaler, absent proof that it was _pursuant to_ a conspiracy, does not violate §1 of the Sherman Act. . . . Moore could prevail only if it proved that its termination _stemmed from_ 'a contract, combination or conspiracy' between Lilly and certain of its wholesalers.

> 662 F.2d at 941 (emphasis added).

This language was later quoted by the court in its decision in Schwimmer. 677 F.2d at 952-953.

Sweeney & Sons and Moore Drug Exchange were subsequently cited in the First Circuit's Bruce Drug decision in support of the Court's statement that:

> The mere existence of a number of complaints in a supplier's files, especially when a small number, is insufficient, without more, to sustain the inference that a dealer was terminated because of them, or because of a conspiracy.
>
> 688 F.2d at 856 (emphasis added.)

The last of the "conflict cases" relied upon by both Monsanto and the United States is the Sixth Circuit's decision in Davis-Watkins. That decision established a causal connection requirement as follows:

> There is no evidence that would

> establish dealer coercion <u>causing</u> Amana to act otherwise than consistent with its market strategy. SMC has not submitted any evidence that Amana's distributors or dealers acted jointly. Complaints to Amana by its distributors and dealers concerning SMC's low prices and lack of services does not establish a <u>causal relationship</u> between such <u>complaints and</u> Amana's imposed restrictions.
>
> 686 F.2d at 1199 (emphasis added).

Finally, the Tenth Circuit's decision in <u>Blankenship</u>, relied upon only by Monsanto,[12] requires the same causal relationship:

> However, for HOM to prevail, it still must show that the termination was 'the result of pressure from another customer,' rather than 'a manufacturer act[ing] on its own in pursuing its own market strategy'.
>
> 661 F.2d at 844.

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12 With respect to Monsanto's apparent uncertainty regarding the identity of the cases defining the alleged conflict between the circuits, see Respondent's Brief In Opposition at page 24.

Monsanto and the United States simply fail to recognize the element that consistently emerges from these cases - the requirement of a causal relationship between distributors' complaints about a competing distributor and a manufacturer's termination of that distributor. There is no conflict between the circuits.

B. Monsanto Engaged In A Classic Resale Price Maintenance Conspiracy, And Its Actions Were Properly Judged By Per Se Standards

It is readily apparent from the record[13] that Monsanto engaged in a classic resale price maintenance conspiracy, and that its actions were properly subject to per se standards of

13 Respondent's Brief In Opposition sets forth the evidence upon which the jury's decision was based at pages 1 through 12 and page 18, note 11. See also the Seventh Circuit's decision. Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226, at 1232-1240 (1982).

liability under Section 1 of the Sherman Act. The evidence established, _inter alia_, that Monsanto received numerous complaints from distributors regarding Spray-Rite's price-cutting practices, and requests from those distributors that Spray-Rite be terminated because of such practices; that Monsanto, in each of the three years preceding its termination of Spray-Rite, threatened Spray-Rite with termination if it did not raise its prices; and that Monsanto subsequently did terminate Spray-Rite because of the distributors' complaints.[14] In light of this evidence, the Seventh Circuit was entirely correct in affirming the jury's

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14 Monsanto effectuated the termination by refusing to renew Spray-Rite's one-year, self-terminating distributor's contract. As the Seventh Circuit correctly noted, there is no functional distinction between the terms "refuse to renew" and "terminated" in the context of this resale price maintenance conspiracy. 684 F.2d at 1233, n.2.

conclusion that Monsanto engaged in a combination and conspiracy with its distributors for the purpose of fixing the distributors' resale prices, and that Monsanto terminated Spray-Rite pursuant to that conspiracy because of Spray-Rite's price-cutting practices.

That such conduct constitutes a *per se* violation of the Sherman Act can hardly be gainsaid. Resale price maintenance conspiracies have been regularly proscribed as *per se* violations by this Court for more than seventy years. *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States v. Line Material Co.*, 333 U.S. 287 (1948); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *United States v. A. Schrader's Son*, 252 U.S. 85 (1920); *United States v. Colgate & Co.*, 250 U.S. 300 (1919);

Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911). Moreover, Congress recently expressed its approval of the *per se* treatment of such activities by repealing those provisions of the Miller - Tydings Act which had previously allowed resale price maintenance at the option of the individual states through the enactment of state fair trade laws.[15]

The evidence of concerted action presented to the jury clearly removed this case from the narrow bounds of permissible behavior under the Colgate doctrine. As this Court observed in A. Schrader's Son:

> It seems unnecessary to dwell upon the obvious difference between the

15 Consumer Goods Pricing Act of 1975, 89 Stat 801, amending 15 U.S.C. § 1, 45(a). See also, California Liquor Dealers, 445 U.S. at 102-103; Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 (1977) (note 18).

> situation presented when a manufacturer merely indicates his wishes concerning prices and declines further dealings with all who fail to observe them, and one where he enters into agreements--whether express or implied from a course of dealing or other circumstances . . . which undertake to bind them to observe fixed resale prices. In the first, the manufacturer but exercises his independent discretion concerning his customers, and there is no contract or combination which imposes any limitation on the purchaser. In the second, the parties are combined through agreements designed to take away dealers' control of their own affairs, and thereby destroy competition and restrain the free and natural flow of trade amongst the states.
>
> 252 U.S. at 99-100.

This Court's decisions proscribing resale price maintenance conspiracies as _per se_ violations simply reflect the fact that:

> In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that

> certain agreements or practices are so 'plainly anticompetitive,' . . .and so often 'lack. . .any redeeming virtue,' . . .that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases.
>
> Catalano Inc. v. Target Sales, Inc., 446 U.S. 643, 646 (1980).

The curious reliance by Monsanto and the United States upon Continental T.V. Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), is unavailing. This Court expressly removed resale price maintenance conspiracies from the scope of that decision:

> As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . .[U]nlike nonprice restrictions, '[r]esale price maintenance is not only

designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands.'. . .

433 U.S. at 51, note 18.

C. The Use Of Certiorari In This Case To Accomplish A Sweeping Revision Of The Law Relating To Resale Price Maintenance, As Proposed By The United States, Would Be Entirely Inappropriate

It is unlikely that any case would justify the course suggested by the United States - that "the Court should grant review in this case to consider whether all vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason."[16] This case, at least, does not.

The United States' ambitious attempt at a sweeping revision of the law is dubious for a number of reasons. First,

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16 Brief For The United States As Amicus Curiae, p. 13.

it ignores entirely the evidence upon which the jury found a resale price maintenance conspiracy between Monsanto and its distributors, and upon which the Seventh Circuit affirmed. Second, it disregards the seventy years of experience with resale price maintenance schemes in light of which this Court and the Congress have regularly condemned such activities as per se violations of the Sherman Act. Finally, it reflects insensitivity towards the respective roles of the Judiciary and the Congress in the formulation and application of the antitrust laws with respect to per se activities, i.e., those whose nature and necessary effect are so plainly anticompetitive that no study of the industry is needed to establish their illegality.[17] As this Court recently

17 See National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978).

explained:

> Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. . . . Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the legislature. . .
>
> Arizona v. Maricopa County Medical Society, 73 L.Ed.2d 48, 65 (1982).

Revisions involving major policy considerations of great significance to this country's "economic bill of rights" require legislative action. Arizona v. Maricopa County Medical Society, 73 L.Ed.2d 48, 65 (1982). Amicus

appearances before this and other courts are an inappropriate way to attempt revisions of this magnitude.

The efforts of the United States are particularly disturbing to the Amici States because of their largely co-extensive responsibility for enforcement of the antitrust laws. The revisionism proposed by the United States reflects profound differences between the United States and the Amici States on basic antitrust policy, and proposes a lesser standard for judging resale price maintenance activities with which the Amici States disagree entirely.

V
CONCLUSION

The Amici States respectfully submit that the petition for a writ of certiorari should be denied.

Dated: February 15, 1983

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On Behalf Of Amici States

No. 82-914

In the Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY, PETITIONER,

v.

SPRAY-RITE SERVICE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether evidence that some distributors of a product complained to the manufacturer about the pricing activities of another distributor, coupled with the manufacturer's subsequent termination of that distributor, is sufficient to permit an inference that the termination was the result of concerted action between the complaining distributors and the manufacturer, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

2. Whether non-price vertical restrictions can be deemed per se violations of Section 1 of the Sherman Act merely because they are alleged to be part of a resale price maintenance scheme, precluding inquiry into the competitive effect of those restrictions.

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INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcement of the federal antitrust laws, has a substantial interest in assuring that the Sherman Act is construed in a manner that advances the Act's objective of protecting the Nation's competitive economic system.

STATEMENT

1. Petitioner Monsanto Company (Monsanto) manufactures chemical products, including agricultural herbicides. Between 1957 and 1968, respondent Spray-Rite Service Corporation (Spray-Rite) bought herbicides from Monsanto (and other manufacturers) and resold them to retail dealers and farmers in northern Illinois and adjacent areas (Pet. App. A-2; Pltff. Exh. 201; Tr. 95, 594).[1] This lawsuit arises out of Monsanto's refusal

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[1] "Tr." refers to the trial transcript.

to renew its distribution agreement with Spray-Rite in 1968 (Pet. App. A-3).

During the period at issue, Monsanto sold its herbicides primarily through a network of about 100 independent wholesale distributors, including Spray-Rite (*id.* at A-2 to A-3). While Monsanto assigned each distributor a geographic area of primary responsibility, the distributors could sell outside their areas, and the areas of responsibility overlapped; for example, 25 Monsanto distributors had primary areas that overlapped with Spray-Rite's (see *id.* at A-2; Tr. 1519-1525).[2]

Corn is a major cash crop, and Monsanto and other firms produced various corn herbicides to improve crop yields (Tr. 3217-3222). By the late 1960's, Monsanto's corn herbicide sales accounted for 15% of that market, while its chief competitor, Geigy, "dominated that market" with a 70% share (Tr. 2881, 3303-3305; Def't Exh. 502). Monsanto was dissatisfied with this situation and determined to improve its efforts to educate retail dealers and farmers about the technical advantages of its products (Tr. 3236-3245). Accordingly, in 1967 Monsanto informed its distributors, including Spray-Rite, that henceforth it would appoint them only for one-year terms and reappoint them based on compliance with six criteria, including: (1) whether the distributor's primary activity was soliciting sales to retail herbicide dealers; (2) whether the distributor employed trained sales personnel capable of implementing Monsanto's new customer education programs; and (3) whether the distributor was fully exploiting the herbicide market in its area of primary responsibility (Pet. App. A-3; Pltff. Exh. 194). After Monsanto's market position deteriorated even further in 1968—its herbicide sales were

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[2] Monsanto also owned and operated a chain of retail chemical stores and employed numerous salesmen to sell directly to retail dealers (Tr. 1519-1525).

down 30% from 1967 (Tr. 3243)—Monsanto introduced a new herbicide, reduced the distributor price and the suggested retail price of another herbicide, suggested lower distributor profit margins, changed its shipping policies to provide for free delivery only within the distributor's primary area of responsibility, and began to give cash bonuses to distributors who participated in Monsanto's technical schools and product demonstrations or gave technical presentations to farmers concerning Monsanto products (Pet. App. A-3).

In the fall of 1968, Monsanto informed Spray-Rite that its distributorship would not be renewed. At that time, 80% of Spray-Rite's herbicide sales by volume were sales of Geigy products; only 16% were sales of Monsanto products (see Pet. App. A-3; Tr. 936-942).[3] For many years prior to its termination, Spray-Rite was essentially a one-man business operating on a low-margin, high-volume basis (Def't Exh. 465). Over the years, Monsanto had received numerous complaints from its distributors about the low resale prices of other distributors (Tr. 181, 184), including Spray-Rite (Pet. App. A-16). Monsanto, however, had received no such complaints regarding Spray-Rite during the year prior to its decision not to renew Spray-Rite (see Tr. 1379-1403). Subsequent to the termination, Spray-Rite continued to sell herbicides for several years, including Monsanto products purchased from other distributors. It ceased operations in 1972 (Pet. App. A-4).

2. Spray-Rite then sued Monsanto, alleging that the termination eventually had forced it out of business altogether and that Monsanto and its distributors had conspired to implement a resale price maintenance scheme. In particular, Spray-Rite charged that it was

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[3] Even so, Spray-Rite was Monsanto's tenth largest distributor of one herbicide (Pet. App. A-3).

the victim of three separate per se violations of Section 1 of the Sherman Act, 15 U.S.C. 1: (1) an agreement among Spray-Rite's competing distributors and Monsanto that Monsanto would not renew Spray-Rite's distributorship; (2) the institution by Monsanto of various non-price vertical restraints that were in fact designed to fix resale prices; and (3) a post-termination agreement among Monsanto and its distributors to limit Spray-Rite's access to Monsanto products. Monsanto denied engaging in any resale price maintenance scheme and contended that the termination was a unilateral act prompted by Spray-Rite's failure to satisfy Monsanto's announced distributorship criteria.

The case was tried to a jury which, in answering three special interrogatories, found for Spray-Rite on each of its theories of per se violation.[4] The jury assessed damages of $3.5 million, which were trebled by the district court on entry of judgment. See 15 U.S.C. 15.

3. The court of appeals affirmed (Pet. App. A-1 to A-42). First, the court noted that Monsanto had received numerous complaints about Spray-Rite's pricing and subsequently terminated Spray-Rite; the court held that evidence "of termination following competitor complaints is sufficient to support an inference of concerted

[4] The interrogatories read as follows (Pet. App. A-4 to A-5):

1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides?

3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?

action" (*id.* at A-15). Second, the court held that Monsanto's non-price vertical practices—the territorial assignments, distributor education and compensation programs, and product shipping policy—were properly deemed per se unlawful, rather than analyzed under the rule of reason, because they were alleged to be "part of an unlawful scheme to fix prices" (*id.* at A-12). Finally, the court ruled that the jury was properly instructed on Spray-Rite's boycott claim and that there was sufficient evidence to support the jury's verdict thereon (*id.* at A-9 to A-11, A-18).[5]

REASONS FOR GRANTING THE PETITION

The decision below conflicts with decisions of four other courts of appeals on the important question whether a manufacturer's receipt from its distributors of complaints about another distributor's pricing, coupled with the manufacturer's subsequent termination of the latter distributor is sufficient, standing alone, to permit an inference of concerted action under Section 1 of the Sherman Act. Moreover, the court of appeals' ruling that nonprice vertical restrictions can be deemed illegal per se if they are merely alleged to be part of a resale price maintenance scheme is contrary to this Court's holding in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

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[5] Monsanto has not sought certiorari on the boycott issue, see Pet. at 3-4 n.4, and we will not discuss that issue here.

The jury's award of damages did not attribute a particular amount to any of the three alleged antitrust violations, nor was there particularized evidence on that subject; instead, Spray-Rite's expert witness calculated a total damage figure and testified that the termination, Monsanto's various nonprice marketing policies, and the alleged post-termination boycott all contributed to and were the sole causes of Spray-Rite's damages. The court of appeals found no error in this approach (Pet. App. A-18 to A-25).

1. The court of appeals' decision creates a sharp conflict among the circuits concerning the evidentiary showing required to establish the element of concerted action in a Section 1 case. The court below held that a terminated distributor may prove the requisite concert of action simply by showing: a) that the manufacturer received complaints about the plaintiff's pricing from other distributors; and b) that the manufacturer subsequently terminated the plaintiff (Pet. App. A-15 to A-16). As the court acknowledged, however (*id.* at A-15), this holding is directly at odds with the rule followed by the Third Circuit, which has concluded that dealer complaints of this sort are so common and so often devoid of competitive significance that, standing alone, they do not prove that termination was the result of concerted action between the complaining dealers and the manufacturer.[6] The First, Second, and Sixth Circuits also have held that mere complaint and termination evidence is insufficient to prove unlawful concerted action in dealer termination cases.[7] There

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[6] *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 115-117 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981).

[7] *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856-857 (1st Cir. 1982); *Schwimmer* v. *Sony Corp.*, 677 F.2d 946, 952-953 (2d Cir.), cert. denied, No. 82-277 (Nov. 8, 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941-945 (2d Cir. 1981), cert. denied, No. 81-2215 (Oct. 4, 1982); *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199 (6th Cir. 1982), petition for cert. pending, No. 82-848 (filed Nov. 19, 1982). Two panels of the Eighth Circuit have reached conflicting results on this issue. Compare *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 991-92 (8th Cir. 1982) (concluding that complaint-and-termination evidence is sufficient to prove agreement) with *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982) (concluding that it is not). These cases were recently reargued before the Eighth Circuit sitting en banc; a decision is expected soon. The United States filed a brief as amicus curiae in the en banc proceeding in *Battle*, urging that the *Battle* decision be vacated and the *Roesch* decision affirmed.

thus is a present conflict in the circuits that Justice White aptly has described as "unmistakable."[8]

This issue is fundamental to Section 1 of the Sherman Act. Because Section 1 bars only concerted activities in restraint of trade, a manufacturer's independent decision about the pricing and distribution of his product does not violate Section 1. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). Indeed, a manufacturer's freedom unilaterally to regulate the distribution of its product so as to win customers from its rivals is of the very essence of competition. See *Sylvania*, *supra*, 433 U.S. at 56; *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1196 (6th Cir. 1982). To allow proof of concerted action to rest merely on complaint-and-termination evidence, as the court of appeals did here, is to undermine Section 1's crucial distinction between collective and unilateral conduct, because such evidence contributes very little to the identification of collective restraints and the rule below would significantly impede independent, procompetitive conduct.

It often will be in a manufacturer's self-interest to terminate a dealer who violates a distributional restriction or otherwise pursues a sales strategy op-

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[8] *Schwimmer* v. *Sony Corp.*, No. 82-277 (Nov. 8, 1982), slip op. 2 n.1 (White, J., dissenting from denial of petition for a writ of certiorari).

The issue is a frequently recurring one. Manufacturers often terminate distributors, a great many terminated distributors easily can portray themselves as pricecutters, and many terminated distributors file antitrust suits against their former suppliers. The question of the type of evidence necessary to prove the existence of an unlawful agreement often will be crucial to the outcome of such cases; indeed, the instant petition is the fourth petition for a writ of certiorari to raise the issue during this Term. See *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, *supra; Schwimmer* v. *Sony Corp.*, *supra; Venture Technology, Inc.* v. *National Fuel Gas Co.*, 685 F.2d 41, 45-46 (2d Cir.), cert. denied, No. 82-362 (Nov. 8, 1982).

posed to that of the manufacturer. As the Seventh Circuit itself recently observed in *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (1982):

> If a supplier wants his distributor to emphasize nonprice rather than price competition, which * * * is the usual reason why he would restrict his distribution, he will be hostile to price cutters because they will make it harder for his other distributors to recoup the expenditures that he wants them to make on presale services to consumers and on other forms of nonprice competition, and of course the undersold distributors will be equally or more hostile.

Such a coincidence of desires, standing alone, can no more support the inference of conspiracy in a dealer termination case than can evidence only of consciously parallel conduct in a case of alleged horizontal price-fixing.[9] Rather, plaintiffs must submit competent evidence from which the trier of fact could reasonably infer that the supplier and complaining distributors had "a common design and understanding, or a meeting of minds in an unlawful arrangement." *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946).

To infer concerted action (in the absence of direct evidence of collusion)[10] thus requires a showing that the conduct is not in the individual self-interest of the participants, acting independently, and is in their collective

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[9] Compare *Theatre Enterprises, Inc.*, v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954), with *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U.S. 600 (1914), and *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208, 227 (1939).

[10] Mere communication between a distributor and supplier, such as occurred here, is not in itself sufficient to prove collusion. Nor does such communication involve the danger to competition posed by advance exchange of price information by competitors. Cf. *United States* v. *Container Corp.*, 393 U.S. 333 (1969).

self-interest only when they coordinate their actions.[11] It is "not enough to show that [the complaining distributors], acting separately * * * wanted to get rid of a competitor; there must also be evidence that in terminating [the plaintiff, the supplier] was acceding to their desire rather than acting to promote an independent conception of its self-interest." *Valley Liquors, supra*, 678 F.2d at 744. But at most, the evidence deemed sufficient here by the Seventh Circuit is probative only of the existence of parallel desires on the part of Monsanto and some of its distributors to see Spray-Rite terminated.

Moreover, the standard adopted by the court of appeals would impede the flow of information between a manufacturer and its distributors that is crucial to the operation of efficient distribution systems.[12] Indeed, in practical effect, the Seventh Circuit's rule could virtually immunize dealers from termination once a competitor has complained. Suppliers who maintain good communications with their distributors (and thus hear their complaints) would be rendered powerless to take action against disruptive dealers who threaten the efficient operation of the distribution system, unless the supplier is willing to run the serious risk of incurring treble damages with no opportunity to show the procompeti-

[11] See *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, *supra*, 678 F.2d at 744; *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc. supra*, 637 F.2d at 111, 114; *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

[12] See *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, *supra*, 637 F.2d at 111 n.2, citing P. Areeda, *Antitrust Analysis* 560 (2d ed. 1974). Unlike horizontally competing firms, a manufacturer and its distributors must constantly coordinate their activities to assure that their product will reach the consumer in an efficient manner. If the manufacturer cannot rely on its distributors to inform it about the operation of the distribution system, it will have to employ some alternative monitor at additional cost.

tive nature of its actions.[13] That opportunity, of course, is one that *Sylvania* requires the courts to preserve. Treating vertical communications as inherently suspect and indiscriminately imposing antitrust liability based on the receipt of such communications is likely to hinder coordination among the links of the distribution chain, to increase the costs of distribution, and ultimately to raise prices to consumers.[14]

2. The court of appeals also erred in ruling that Spray-Rite's mere *allegation* that Monsanto's non-price marketing policies were part of a resale price maintenance scheme entitled Spray-Rite to reach the jury on the theory that those measures were per se violations of Section 1 (Pet. App. A-11 to A-13).[15] This ruling un-

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[13] See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 12-13 (1981).

As the evidence in this case demonstrates, distributors routinely complain to suppliers about the supposed price-cutting activities of competing distributors; Spray-Rite itself made such complaints to Monsanto (Tr. 181). Indeed, the supplier's first information about an infraction frequently will come in the form of complaints by other distributors.

[14] Another adverse consequence of the court of appeals' in terrorem rule concerning the receipt of distributor complaints stems from its open-ended nature: so long as termination follows at some time subsequent to the complaint, the jury may infer concerted conduct. In this case, for example, there was no evidence that Monsanto received any complaints about Spray-Rite during the entire year preceding its termination, see *supra* at 3; yet the court of appeals held that complaints made two to four years previously were sufficient evidence that Monsanto acted, not unilaterally, but in concert with its distributors.

[15] We recognize that respondent may contend that it did more than merely allege a connection between the non-price policies and a price-fixing scheme, namely, that it proved the connection and that the jury so found. But, the court of appeals' analysis, on its stated terms, found the allegation itself to be dispositive (Pet. App. A-13). Thus, the court expressly linked the invocation of a per se approach to respondent's allegations and not to

dermines the distinction made in *Sylvania* between price and non-price vertical restrictions and threatens to stifle many types of procompetitive non-price actions taken by manufacturers in order to stimulate interbrand competition.

a. In *Sylvania*, this Court held that non-price vertical restrictions present sufficient procompetitive potential to be judged under the rule of reason rather than the per se rule. 433 U.S. at 49-50. The Court stated that while vertical restrictions "reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers," they also "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." *Id.* at 54.[16] Accordingly, the Court concluded that antitrust plaintiffs should be required to prove that non-price vertical restrictions are anticompetitive in the particular circumstances in which they are employed.[17]

Monsanto's territorial assignments for distributors, its compensation programs for distributors who participated in Monsanto's customer education programs, and its free delivery of herbicides to locations within the distributor's primary area of responsibility are all non-

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the proof adduced at trial. We believe this statement of the law is incorrect and would be an inappropriate standard for decision in future cases.

[16] As the Court noted, economists stress that manufacturers "have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products." 433 U.S. at 56; see R. Bork, *The Antitrust Paradox* 290 (1978).

[17] On remand in *Sylvania* the Ninth Circuit found that the non-price vertical restrictions there were reasonable: "The restraint was likely to promote interbrand competition given the market structure in the television manufacturing industry * * *." *Continental T.V., Inc.* v. *GTE Sylvania, Inc.* No. 79-4131 (Sept. 28, 1982), slip op. 4605.

price vertical practices. They are precisely the type of practices identified in *Sylvania* as likely to have procompetitive effects on the interbrand level that might well outweigh possible anticompetitive effects on the intrabrand level. See 433 U.S. at 54-55.[18] It is also clear that after the implementation of these new marketing policies, Monsanto significantly increased its share of the corn herbicide market (from 15 to 28%) at the expense of the dominant manufacturer, Geigy (whose market share fell from 70 to 55% during the same four-year period) (Def't Exh. 502). Finally, Spray-Rite conceded at trial that it had not attempted to prove that the vertical restrictions violated Section 1 when analyzed under the rule of reason. In these circumstances, the court of appeals' transmutation of Monsanto's non-price marketing policies into per se violations solely on the basis of an allegation that they were part of a price fixing scheme effectively negates *Sylvania*'s careful distinction between price and non-price vertical restrictions.[19]

The practical effect of the court of appeals' decision would be to permit antitrust plaintiffs to avoid the evidentiary requirements of rule of reason analysis with respect to almost all types of non-price vertical restric-

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[18] "Established manufacturers can use [non-price vertical restrictions] to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." 433 U.S. at 55.

[19] The court of appeals concluded that *Sylvania* was not controlling (Pet. App. A-12); instead, the court relied (*ibid.*) on *United States* v. *Sealy, Inc*, 388 U.S. 350 (1967). *Sealy*, however, involved horizontal restraints, as this Court expressly stated. 388 U.S. at 352. The decision in *Sealy* correctly recognizes that a distinction exists between horizontal and vertical cases, with a different standard for determining liability applicable to each. *Id.* at 354. There was no evidence that Monsanto adopted these programs as the result of collusion among its distributors.

tions, for it is easy to allege that manufacturer-initiated measures taken in order to improve the manufacturer's competitive position on the interbrand level were in fact part of a larger intrabrand price-fixing agreement. While it is certainly possible that such a scheme could exist, the court of appeals' failure to require any credible evidence that it exists in fact threatens to chill the efforts of manufacturers to implement numerous procompetitive vertical marketing decisions that, under *Sylvania*, should be entitled to rule of reason analysis instead of per se condemnation.[20]

b. But there is a more fundamental problem with the court of appeals' reasoning. In *Sylvania*, this Court recognized that too broad an application of the per se rule to vertical restrictions might prohibit practices that may have significant procompetitive effects. 433 U.S. at 51-52, 57-59. Nevertheless, the Court continued to assume a substantive competitive distinction between "non-price" and "price-related" vertical restrictions, applying rule of reason analysis to the former and conclusively presuming the latter to be unlawful. *Id.* at 51 n.18. The court of appeals' decision reveals the difficulties inherent in attempting to categorize vertical restrictions in this manner for purposes of competitive analysis. Accordingly, the Court should grant review in this case to consider whether *all* vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason.

First, as this case shows, in practice it is often difficult, if not impossible, to distinguish between "price" and "non-price" vertical restrictions because both types

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[20] In *White Motor Co.* v. *United States*, 372 U.S. 253, 260-264 (1963), this Court required a manufacturer's system of exclusive territories to be evaluated separately for possible anticompetitive effects, even though the plaintiff had proven that the manufacturer was otherwise engaged in price fixing.

of restrictions can have an impact on price.[21] Spray-Rite's theory was that although Monsanto's marketing practices had no direct effect on price, they had the indirect effect of making it economically undesirable for Monsanto distributors to sell to Spray-Rite, thus preventing Spray-Rite from continuing to purchase sufficient quantities of Monsanto herbicides to engage in intrabrand price competition. In the court of appeals' view, this indirect effect on price negated the obvious procompetitive value of Monsanto's non-price marketing innovations. See *supra*, pages 4-5. While non-price arrangements characteristically will have some effect on price, the court of appeals was far too quick to associate any such effect, no matter how attenuated, with a per se violation. After all, this Court recognized in *Sylvania* that a manufacturer's use of non-price vertical restrictions may well have an indirect effect on the level of intrabrand retail prices, see 433 U.S. at 54, yet the Court held that such restrictions must be judged under the rule of reason.

Second, disparate treatment of non-price vertical restraints and resale price maintenance makes little sense from the standpoint of antitrust policy, because resale price maintenance in some situations can have procompetitive or neutral effects. As Professor (now Judge) Posner has explained, resale price maintenance

> is more flexible than exclusive territories as a method of limiting price competition among dealers, and it may be the only feasible method where

[21] For example, *Sylvania* squarely held that it was not per se unlawful for a manufacturer to require its dealers to sell only from a particular location—a "non-price" vertical restriction. 433 U.S. at 38, 57-59. But through "judicious spacing of dealerships the manufacturer with dealerships containing a location clause can limit price competition among its dealers" in order to discourage free riders. See Posner, *supra*, 48 U. Chi. L. Rev. at 11-12.

> effective retail distribution requires that dealers be located close to one another; any free-rider or other arguments that are available to justify exclusive territories are equally available to justify resale price maintenance.[[22]]

That certainly is not to say that resale price maintenance is always procompetitive on balance, or even that resale price maintenance and non-price vertical distribution arrangements are equivalent in anticompetitive potential. But they are sufficiently similar in their basic competitive characteristics that the rationale of this Court's decision in *Sylvania*—that per se rules should be applied only to practices that are clearly anticompetitive in almost every situation—compels the conclusion that resale price maintenance activities, too, should be analyzed under the rule of reason.[23] This conclusion is further justified by the evident difficulty in practice of defining just what vertical restrictions should be categorized as resale price maintenance in the first place.

Finally, it would now be appropriate for this Court fully to reexamine the legal status of resale price maintenance. The Court has always regarded the rule of reason as the normal test of the unreasonableness of an alleged restraint; per se rules are invoked only where

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[22] Posner, *supra*, 48 U. Chi. L. Rev. at 9. Indeed, the similarities in purpose and effect between resale price maintenance and non-price vertical restrictions led Justice White to observe in his concurring opinion in *Sylvania* that the "effect * * * of the Court's opinion is necessarily to call into question" the per se rule against resale price maintenance. 433 U.S. at 70.

[23] This Court has recognized that resale price maintenance can increase output by inducing dealers to engage in "demand-creating activity" (such as product promotional activities) that may, in certain cases, outweigh the loss of sales that might have been made in the absence of resale price maintenance. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151 n.7 (1968). See *Sylvania*, 433 U.S. at 70 (White, J., concurring).

economic and judicial experience has shown that certain practices invariably have a "pernicious effect on competition" *and* lack "any redeeming [competitive] virtue." *Sylvania, supra*, 433 U.S. at 49-50; *Northern Pacific Ry* v. *United States*, 356 U.S. 1, 5 (1958). But the Court has never examined that experience with respect to resale price maintenance. Rather, more than 70 years ago the Court simply *assumed*, in *Dr. Miles Medical Co.* v. *John D. Park & Sons*, 220 U.S. 373, 404-409 (1911), that vertical price fixing is equivalent in all respects to horizontal price fixing and constitutes an unlawful restraint on alienation, and the Court has continued to make that assumption. See, e.g., *Rice* v. *Norman Williams Co.*, No. 80-1012 (July 1, 1982); *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980); *Sylvania, supra*, 433 U.S. at 51 n.18. See generally Levi, "*The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*," S. Ct. Rev. 250 (1960).[24]

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[24] Justice Holmes dissented from the *Dr. Miles* decision on the ground that resale price maintenance had not been shown to be anticompetitive on balance, see 220 U.S. at 411-413, and (with Justice Brandeis) continued to dissent from decisions presuming resale price maintenance to be unlawful. *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 100 (1920); *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 456-457 (1922). In his dissent in *Dr. Miles*, Justice Holmes urged that the "point of most profitable return[ ] [to the manufacturer] marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The [manufacturer] knows better than we do what will enable it to do the best business." 220 U.S. at 412. More recent observers have expressed the same view. E.g., Bork, *supra*, at 33, 288-290.

The *Dr. Miles* majority's reliance on the Elizabethan law of restraints on alienation has been criticized for decades. See Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 983 (1928); Bork, *supra*, at 284-285. As this Court noted in *Sylvania:* "We quite agree * * * that 'the state of the common law 400 or even 100 years ago is irrelevant to the issue [of] the

Indeed, the received learning about resale price maintenance has been so little questioned because antitrust defendants are highly unlikely to contest a 70 year old per se classification[25] and the Court has had no occasion to reconsider the assumptions made in *Dr. Miles.*[26] The Court should grant review in this case to address the

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effect of the antitrust laws upon vertical * * * restraints in the American economy today.'" 433 U.S. at 53 n.21.

[25] Rather, defendants accused of resale price maintenance generally have argued that there was no agreement to maintain resale prices. See, e.g., *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 36-38 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944).

[26] *Sylvania* did mention possible reasons why resale price maintenance might be treated differently from "non-price" vertical restraints, see 433 U.S. at 51 n.18, but the Court did not rule on that issue or reexamine *Dr. Miles*, and we believe that none of the concerns justifies a continued per se rule. Thus, in *Sylvania* the Court noted the possibility that industrywide resale price maintenance might facilitate cartelization. But that concern could be addressed on a case by case basis, since cartels—whether at the dealer or the manufacturer level—are per se illegal in themselves; it provides no justification for an absolute ban on resale price maintenance in every industry. See Bork, *supra*, at 292-294; Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*," 45 U. Chi. L. Rev. 1, 7-8 (1977). The Court also suggested that resale price maintenance might reduce not only intrabrand price competition, but interbrand competition as well. But in cases where a court finds, on balance, that resale price maintenance has anticompetitive effects in both intrabrand and interbrand competition, it might still conclude, under the analysis we propose, that Section 1 has been violated. Finally, *Sylvania* cited Congress' repeal in 1975 of the Miller-Tydings and McGuire Acts, which permitted resale price maintenance at the option of individual states. However, while the 1975 legislation terminated the states' authority to immunize certain conduct from *all* antitrust scrutiny, it did not prescribe the standard for such scrutiny. It remains for this Court to determine, as it has for more than 90 years under the Sherman Act, whether a per se or rule of reason analysis is applicable. See Bork, *supra*, at 288; Posner, *supra*, 45 U. Chi. L. Rev. at 8-9.

question of the competitive analysis to be applied to all forms of vertical restraints, "price" and "non-price" alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1983

No. 82-914

In The

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF OF PETITIONER MONSANTO COMPANY

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QUESTIONS PRESENTED

1. Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a *per se* rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?

2. Can a *per se* unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?

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Brief of Petitioner Monsanto Company[1]

OPINIONS BELOW

The opinion of the court of appeals is reported at 684 F.2d 1226 and appears as App. A in the Appendix to the petition for writ of certiorari ("Pet. App."). The district court's unreported ruling denying Monsanto's motion for a directed verdict appears as Pet. App. D. The district court denied Monsanto's motion for judgment notwithstanding the verdict on July 15, 1980.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1982. (Pet. App. B). A timely petition for rehearing,

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[1]The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28 appears at page ii of the petition. There have been no changes to the parties in the interim.

suggesting that rehearing be *en banc*, was denied on September 8, 1982. (Pet. App. E). A timely petition for writ of certiorari was filed on December 7, 1982. On February 28, 1983 this Court granted the petition. Jurisdiction of this Court is premised upon 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

STATEMENT OF THE CASE

Nature of the Case.

This private antitrust action arises from Monsanto's nonrenewal of the distributor contract of respondent Spray-Rite Service Corporation. Monsanto is a manufacturer of agricultural herbicides, which it markets through wholesale distributors. Spray-Rite was a wholesale distributor for Monsanto and other herbicide manufacturers. After its nonrenewal in 1968, Spray-Rite continued in business until 1972, when it ceased operations and filed this action for treble damages under Section 4 of the Clayton Act, 15 U.S.C. § 15. (Pretrial Order ¶6).

The central premise of Spray-Rite's action was that Monsanto conspired with some of its distributors to fix the resale prices of Monsanto herbicides in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. (Tr. 4350, J.A. 19-20).[2] Based on

[2] The following abbreviations are used in this Brief: "J.A." (Joint Appendix filed in this Court by Petitioner and Respondent); "Pet." (Petition of Monsanto Company for Writ of Certiorari); "U.S. Amicus Brief" (Brief of the United States as

(footnote continued on next page)

that premise, Spray-Rite claimed, first, that certain promotional programs and distribution policies adopted by Monsanto in 1968 as part of a new marketing strategy were part of the alleged price-fixing conspiracy and, second, that the non-renewal of its distributor contract was pursuant to the alleged conspiracy. (*Id.*). Spray-Rite did not allege a horizontal conspiracy.

The Seventh Circuit affirmed a jury verdict for Spray-Rite on both claims.[3] Spray-Rite had disavowed any claim that Monsanto's promotional programs and distribution policies were illegal distribution restrictions under the *Sylvania* rule of reason standard.[4] It had agreed that Monsanto became a more effective competitor after their introduction. (Tr. 2990, 2993-95, 3983). The Seventh Circuit condemned them, however, applying a *per se* rule because Spray-Rite alleged that they were part of a price-fixing conspiracy. It held that *Sylvania* "applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices." 684 F.2d at 1237, Pet. App. A-12 (emphasis added). Holding this allegation to be determinative, the court made no rule of reason inquiry into the competitive effects of Monsanto's programs and policies. Nor did the court analyze whether any evidence linked them to the alleged price-fixing conspiracy.

(footnote continued from preceding page)

Amicus Curiae in Support of Petition); "Resp. Brief" (Respondent Spray-Rite's Brief in Opposition to the Petition); "Tr." (trial transcript); "PX" (plaintiff's exhibit); "DX" (defendant's exhibit); "Cir. Brief" (Brief for Defendant-Appellant Monsanto Company in the Seventh Circuit).

[3]The Seventh Circuit also affirmed the finding of a post-termination group boycott of Spray-Rite. Monsanto disagrees with, but did not seek review of, the Seventh Circuit's decision on this issue.

[4]*Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977).

The Seventh Circuit affirmed the finding of a price-fixing conspiracy although there was no evidence of an actual agreement to fix prices or evidence of adherence to Monsanto's suggested prices. The court based its affirmance solely on evidence that Monsanto, concerned about its distributors' resale prices, declined to renew Spray-Rite after receiving price complaints from other distributors. 684 F.2d at 1239, Pet. App. A-15 to 16. The court neither required nor identified any other proof of a causal connection between the complaints and the non-renewal.

This case presents two fundamental issues regarding application of the antitrust laws to manufacturer-distributor relations: (1) when should non-price distribution restrictions, normally tested under the rule of reason, be condemned as part of *per se* unlawful price fixing; and (2) can a *per se* unlawful price-fixing conspiracy be inferred solely from the termination of a distributor following price complaints from other distributors? Because vertical non-price restrictions are widely used and distributor terminations frequently occur, the resolution of these issues will broadly affect the nation's business.

Monsanto's Weak Competitive Position in 1967-1968.

Monsanto entered the agricultural herbicide market in 1956 by introducing the first "pre-emergent" herbicide. Unlike older products, which kill weeds after they emerge, pre-emergent herbicides prevent weeds from germinating. (Tr. 3217).

Although Monsanto's herbicides were acknowledged as excellent, they were slow in gaining acceptance by retail dealers and farmers. (Tr. 531-33, 3221). In 1967-1968 Monsanto remained a weak competitor facing dominant manufacturers. (Tr. 2147, 2881, 3234-35, 3241-43, 3293-94; DX 500-03, J.A. 112-15, Tr. 3300). Its sales in 1968 accounted for approximately 3% of the soybean herbicide market and 15% of the corn herbicide market. (DX 501-02, J.A. 113-14, Tr. 3300).

The entrenched market leader in corn herbicides commanded a 70% share. (*Id.*).

After internal study, Monsanto concluded that it could not remain in the herbicide business unless it overcame deficiencies in its marketing and distribution system and improved its market position. (Tr. 3243-44). Like most herbicide manufacturers, Monsanto markets through non-exclusive wholesale distributors who resell to retail dealers and other customers. (Tr. 534, 1355, 3395-98, 3551). Dealers play an important role in the marketing of herbicides. Most farmers purchase herbicides from dealers and look to them for product recommendations and technical advice. (Tr. 3237-38). This advice is essential to farmers, since the proper selection and application of a herbicide depends upon many variables, including the type of crop, the type of weeds to be controlled, climate, rainfall, and soil type. (Tr. 755, 915-16, 947-48, 1004). Improper use of a herbicide can damage or destroy a crop. (Tr. 512, 916, 945, 1004).

Monsanto concluded that it had failed to become an effective competitor because its products were inadequately represented at the dealer level and because dealers and farmers lacked a technical understanding of those products. (Tr. 3237-40, 3243-45). It decided that it needed the assistance of its distributors to overcome these problems. (Tr. 3246-48). Accordingly, Monsanto adopted a new marketing strategy that included technical education programs, an expansion of its technical support staff, and increased promotional and educational activities by Monsanto and its distributors. (Tr. 3244-45, 3294-3300).

Monsanto's New Marketing Strategy.

In September 1967 Monsanto notified its distributors by letter that they would be appointed for one-year terms and

evaluated for renewal in mid-1968 based on several criteria, including:

1) Whether the distributor's primary activity was soliciting sales to herbicide dealers;

2) Whether the distributor employed trained salesmen capable of carrying out Monsanto's technical education programs with dealers and farmers; and

3) Whether the distributor was adequately exploiting the market for Monsanto products in his area of primary responsibility. (Tr. 3239-40; PX 194, Tr. 602, 603).

Beginning in 1968 Monsanto strengthened its marketing strategy by introducing several programs and policies to increase the availability of Monsanto herbicides at retail outlets and to provide better product information to dealers and farmers. (Tr. 3244-45, 3296-98; PX 136, J.A. 43-45, Tr. 4208; DX 9 at p. 11, Tr. 4208). A key element of its strategy was a series of incentive programs to induce distributors to promote the sale of Monsanto herbicides to retail dealers, educate dealers and farmers on the technical advantages and applications of Monsanto's products, and stock dealers' shelves early in the selling season. (Tr. 1665-73, 1679-81, 3246-48; PX 136, J.A. 43-45, Tr. 4208; DX 9 at p. 11, Tr. 4208). These programs, which varied from year to year, provided for certain payments to distributors:

1) Payments ranging from \$10 to \$500 for sending distributor or dealer salesmen to Monsanto technical schools or clinics;

2) Payments ranging from \$25 to \$500 for holding farmer educational meetings, planting demonstration fields and conducting farmer field tours;

3) Payments ranging up to 60¢ per 100 pounds on herbicides purchased by the distributor before the herbicide selling season;

4) Payments ranging from 2¢ to 49¢ per 100 pounds on herbicides sold to dealers (conditioned from time to time on the distributor participating in Monsanto's technical schools, stocking dealers' shelves early in the herbicide selling season, or providing non-price customer information to Monsanto).[5]

As another element of its marketing strategy, Monsanto changed its shipping policies in 1968 to encourage distributors to develop the market potential in their areas. (Tr. 1513, 1563-65; PX 137, J.A. 48-49, Tr. 4208). Monsanto continued its long-standing policy of assigning distributors to non-exclusive areas of primary responsibility and designating between 10 and 20 distributors to cover each such area.[6] Beginning in 1968, it permitted distributors to pick up products only at Monsanto warehouses within each distributor's area of responsibility and provided free deliveries of products to the distributor or its customers only within that area. (Tr. 1558-60, 2480-81). These policies assisted Monsanto in coordinating the efficient movement of products through its warehouses and in ensuring their availability to customers during the busy planting season. (Tr. 2479-81).

The Success of Monsanto's New Marketing Strategy.

Monsanto's new marketing strategy succeeded. Its market share in soybean herbicides increased from approximately 3% in 1968 to 19% in 1972, while its share in corn herbicides increased from approximately 15% to 28%. (Tr. 3301-05; DX 501-02, J.A. 113-14, Tr. 3300). These increases came largely at the expense of the market leaders, and the soybean and corn herbicide markets became less concentrated. The combined market shares of the two leaders in soybean herbicides decreased from approximately 70% in 1968 to 52% in 1972. In

[5](DX 9 at p. 11, Tr. 4208; DX 12, Tr. 3579, 4208; DX 36, Tr. 4208; DX 38, J.A. 88, Tr. 4208).

[6](DX 144, Tr. 1045, 1046; DX 189, Tr. 4208; DX 190, J.A. 95, Tr. 3060, 3063).

the same period, the share of the previously dominant corn herbicide manufacturer decreased from approximately 70% to 55%. (*See* Figure 1). This deconcentration was accompanied by an increase in total industry output following the introduction of Monsanto's marketing strategy. Between 1968 and 1972, use of soybean and corn herbicides grew by approximately 75% and 15% respectively.[7] Monsanto's output increased at an even greater rate. (DX 500, J.A. 112, Tr. 3300; DX 503, J.A. 115, Tr. 3300).

Spray-Rite agreed that Monsanto became a more effective competitor and that the herbicide market was highly competitive after Monsanto introduced its new marketing strategy. Its expert testified that the incentive programs tended to focus distributors' sales efforts on dealers and agreed that Monsanto's promotional efforts and emphasis on technical selling contributed to the improvement in its market position. (Tr. 2675, 2679, 2993-95). He described the herbicide industry as "highly competitive." (Tr. 2990).

The Nature of Spray-Rite's Business.

Spray-Rite became a Monsanto distributor in 1957 and was one of approximately 100 Monsanto distributors in 1968. (Tr. 598, 1528). It employed only one salesman, its principal owner, and operated as a high volume, low overhead seller. (Tr. 575-76, 1682). It publicized its "policy of selling as a brokerage house." (Tr. 3629-30; PX 19, J.A. 30, Tr. 666, 667). Its advertising explained that "[w]e spread ourselves quite thin in a large volume, small margin operation" and that "[a]s the season gets closer, our time gets so limited with our type of operation, that I cannot offer services that I feel are so necessary in this technical, exacting business of Agricultural Chemicals." (DX 465, J.A. 101, Tr. 4209). Spray-Rite sold primarily to large customers such as seed growers, rather than to the retail dealers on whom Monsanto's new marketing strategy was focused. (Tr. 597-98, 1107, 1682-85).

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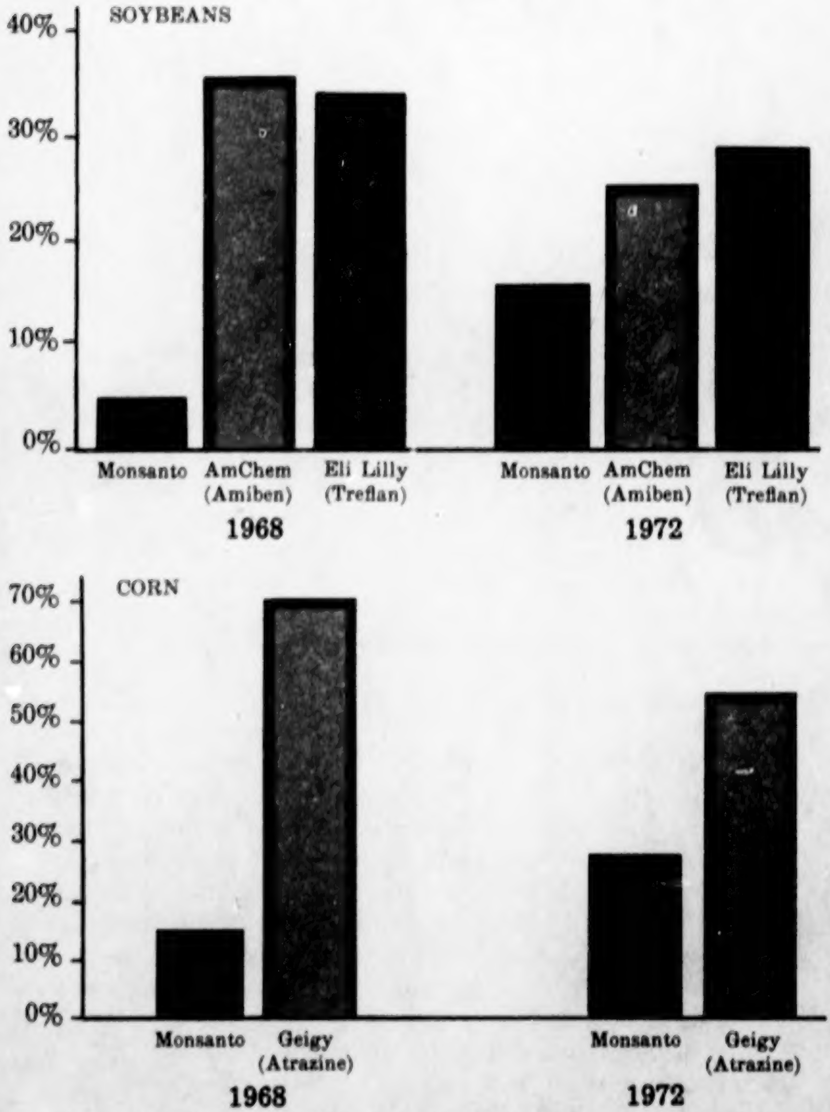
[7](DX 213, Tr. 4208 (Table 6—Total U.S. Corn and Soybean Herbicides in 1972); DX 214 at 9, 11, Tr. 4208).

FIGURE 1

HERBICIDE MARKET SHARES: 1968 AND 1972*



*Source: DX 501, J.A. 113, Tr. 3300; DX 502, J.A. 114, Tr. 3300.

Spray-Rite concentrated on selling Atrazine, the product of Monsanto's dominant competitor. (Tr. 936-42, 1074). In April 1968, it advertised that Atrazine was "King of all corn herbicides," and would "remain master of all for some years to come." (PX 20, J.A. 33, Tr. 668, 670). In 1968, Spray-Rite's last year as a Monsanto distributor, Atrazine accounted for 73% of its herbicide sales, while Monsanto products accounted for only 16%. (Tr. 936; DX 454, Tr. 3079, 3085, 3086; DX 455, Tr. 3087, 3088).

Throughout its eleven-year tenure as a Monsanto distributor, Spray-Rite consistently sold Monsanto products below suggested resale prices. (Stipulation at Tr. 614; Tr. 611, 1218-19). Monsanto was aware of this price cutting from the outset and received price complaints about Spray-Rite from other distributors between 1964 and May 1967. (Tr. 92, 111-13, 115-18, 127-29, 1390-1401, 3626, 3631; PX 185, Tr. 1392, 1394, 1395). However, Monsanto continued Spray-Rite's distributorship and gave it a new contract in September 1967, four months after receiving the last price complaint. (PX 194, Tr. 602, 603; PX 201, Tr. 601, 603).

Monsanto's Non-Renewal of Spray-Rite.

Spray-Rite received Monsanto's distributor renewal criteria when its distributor contract was renewed in September 1967. (PX 194, Tr. 602, 603; PX 196, J.A. 59-60, Tr. 157-58, 199). Its owner, Donald Yapp, understood that Monsanto expected distributors to hire trained sales personnel, to focus on selling to dealers, and to participate in Monsanto's technical programs. (Tr. 1048-50). He understood that Monsanto would renew only those distributors who carried out that strategy. (Tr. 1052-53). He did not hire a sales force and continued selling on a high volume, low margin basis, concentrating on a few large customers. (Tr. 1059-63, 1106-07, 1682). In the year before its non-renewal, nearly 75% of Spray-Rite's sales of Monsanto products were to six customers. (DX 456, Tr. 3079, 3091, 3092).

In the fall of 1968, *fifteen months after receiving the last price complaint about Spray-Rite,* Monsanto declined to renew its contract. Monsanto witnesses testified that Spray-Rite was not renewed because it failed to hire additional salesmen and to adequately promote sales to dealers. (Tr. 1110, 2510-15, 3825-26). Spray-Rite claimed that it was not renewed solely because of its price-cutting. (Tr. 767-74).

Price Behavior in the Herbicide Market.

It is undisputed that there was vigorous price competition in the herbicide market both before and after Monsanto adopted its new marketing strategy. (Tr. 455-56, 692-93, 1465, 2140, 2990, 3349-53, 3413). In early 1969 Monsanto reduced by 10% the base price to distributors on its principal product and reduced its suggested resale price accordingly.[8] With rare exceptions, Spray-Rite and all other Monsanto distributors sold below—often substantially below—Monsanto's suggested resale prices.[9] As one of Spray-Rite's witnesses testified, "Price cutting was a way of life with distributors." (Tr. 2234). Distributors, *including Spray-Rite,* continually complained to Monsanto about other distributors' low resale prices. (Tr. 181, 184, 2471). Such complaints were "standard practice." (Tr. 184).

Like all manufacturers, Monsanto was interested in resale prices. It used resale price information to set its own prices and to suggest distributor resale prices at competitive levels. (Tr. 1678-79, 2301). Monsanto was also concerned that distributors' profit margins be adequate to support their participation in its promotional and educational programs. (Tr. 1640-43, 1654-58, 1679-81; PX 146, Tr. 1630, 1631). Monsanto

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[8] (Tr. 1560, 1678-79, 3298-99, 3843-44; DX 19 at pp. 6-7, Tr. 4208; DX 467a-c, J.A. 109-11, Tr. 3821, 3842).

[9] (Tr. 226, 406-08, 457, 575-77, 1077-1083, 1218-19, 1458-59, 1664-65, 1969-70, 1973, 2139, 2234, 2440, 2469-70, 2505, 3559-60, 3610, 3634-35, 3645-47, 3648-49, 3700, 3732-33, 3779; PX 309, J.A. 73, Tr. 1646, 1651 (*compare* col. 3 *with* col. 4); DX 464, Tr. 3079, 3124). Spray-Rite's resale prices were not the lowest. (Tr. 2139).

published suggested resale prices and, on occasion, encouraged Spray-Rite and other distributors to observe them. (Tr. 114; DX 17-21A, Tr. 4208).

The Trial and Verdict.

At trial, Spray-Rite sought to establish that its non-renewal resulted from a price-fixing conspiracy between Monsanto and other distributors. To link other distributors to the non-renewal, Spray-Rite relied on evidence that certain distributors complained to Monsanto about its prices between 1964 and May 1967, the last complaint occurring fifteen months before Spray-Rite's non-renewal.

Spray-Rite presented no evidence that distributors' resale prices were controlled or that intrabrand price competition was prevented. There is no evidence that Monsanto entered into written agreements requiring resale price maintenance. There is no evidence that distributors agreed to follow Monsanto's suggested resale prices or to observe any other price level. There is no evidence that any distributor acquiesced in any price coercion by Monsanto.[10] There is no evidence that distributors adhered to Monsanto's suggested resale prices, and there is unrebutted evidence that all distributors regularly sold below the suggested prices and that prices were not uniform. Finally, there is no contention that any of Monsanto's distributors agreed among themselves to fix prices.

At trial, Spray-Rite disavowed any claim that Monsanto's promotional programs and distribution policies were illegal

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[10] There is contradicted testimony that Monsanto employees threatened in the summer of 1966 and early spring 1968 to terminate Spray-Rite because of its low prices. (Tr. 617-19, 711, 1117-22). However, it is undisputed that Spray-Rite never changed its pricing in response to these alleged threats. (Tr. 1077-78). There was contradicted testimony by another Monsanto distributor that he was threatened with termination if he did not increase his prices (Tr. 306-07, 3468-69), but it is undisputed that he never changed his low prices. (Tr. 396-99, 457-58).

in themselves, conceding that "if those programs were implemented for Monsanto's own reason without a price fixing conspiracy, there is no contention that those programs . . . are illegal." (Tr. 3983). Instead, Spray-Rite contended that those practices were *per se* unlawful as part of the alleged price-fixing conspiracy. (Tr. 3984).

Spray-Rite based this contention on its expert's opinion that Monsanto's programs and policies would have an "influence" on distributors' resale prices and would tend to discourage distributors' sales to non-dealers and to customers outside their areas of primary responsibility. (Tr. 2667-68, 2674-79, 2908-14, 3018-19, 3986-88). The expert did not explain how these claimed economic effects could support a price-fixing scheme. Nor did Spray-Rite contest evidence that Monsanto designated between 10 and 20 distributors for each primary responsibility area and that distributors continued to sell large quantities of Monsanto products to non-dealers and to customers outside those areas.[11]

Spray-Rite presented no evidence that Monsanto introduced or implemented its programs or policies for the purpose of controlling resale prices. There is no evidence that Monsanto consulted with any distributor before implementing them. There is unrebutted evidence that the programs and policies were adopted by Monsanto to stimulate distributors' promotional and educational efforts with dealers and to improve Monsanto's distribution efficiency. (Tr. 1558-60, 1665-73, 1680-81, 2479-81, 3243-46, 3296-98).

Monsanto moved for a directed verdict on the grounds that the evidence was insufficient either to establish a price-fixing conspiracy or to link Monsanto's promotional programs and distribution policies to such a conspiracy. (Tr. 3044-46, 3984-91). The trial court denied the motions, but did not address

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[11](Tr. 3600-03, 3729-31; DX 190, J.A. 95-97, Tr. 3060, 3063; DX 287, Tr. 3434, 3802, 3803; DX 288, Tr. 3434, 3802, 3803; DX 466, J.A. 102-08, Tr. 3805, 3806).

whether any evidence connected the programs and policies to the alleged price fixing.[12]

The jury returned a general verdict against Monsanto based on the combined effects of the non-renewal, the various programs and policies and an alleged post-termination boycott.[13] (2/21/80 Tr. 2-3). Spray-Rite was awarded approximately $10 million in trebled damages for the loss of a product line amounting to only 16% of its business, although Spray-Rite had never earned more than $89,000 per year in pre-tax profits. (PX 122-127, Tr. 716, 717; DX 454, Tr. 3079, 3085, 3086).

The Seventh Circuit Decision.

Monsanto appealed from the denial of its motion for a directed verdict on the price-fixing conspiracy claim. (Cir. Brief at 46-56). The Seventh Circuit affirmed, holding that an unlawful price-fixing conspiracy could be based solely on the circumstances surrounding Spray-Rite's non-renewal. It held that "proof of termination following competitor complaints is sufficient to support an inference of concerted

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[12] In denying the motion, Judge Roszkowski stated only:

> I think that there is some evidence that I think would allow that to go to the jury on the question of whether or not there was such a [price-fixing] conspiracy.
>
> . . .
>
> And I think there was also some evidence whether there were certain customer and territorial restrictions regarding the distribution of defendant's products.

(Tr. 3991-92; Pet. App. D).

[13] Spray-Rite's damage theory was premised on the aggregate effects of the non-renewal, the promotional programs and distribution policies, and the alleged group boycott. Its damage expert testified that he did not separately determine the effect on Spray-Rite of each element of the alleged violations. (Tr. 2891-93, 2897).

action." 684 F.2d at 1238, Pet. App. A-15 to 16.[14] The court did not address whether Spray-Rite had proven a price-fixing conspiracy beyond its non-renewal.

Monsanto also appealed from the denial of its motion for a directed verdict with respect to its promotional programs and distribution policies on the ground that no evidence connected them with the alleged price fixing. (Cir. Brief at 28-32). It urged that those practices should be tested under the *Sylvania* rule of reason. (*Id.*). The Seventh Circuit rejected Monsanto's reliance on *Sylvania* as "misplaced," holding that the mere allegation that the non-price practices were part of a price-fixing conspiracy mandated a *per se* rule:

> *United States* v. *Sealy* rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices. Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of an unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the *per se* rule.[15]

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[14] The Seventh Circuit held that Spray-Rite had satisfied this standard with evidence that: Monsanto had received complaints about Spray-Rite's prices and considered Spray-Rite a price cutter; some distributors had requested Spray-Rite's termination; Monsanto was concerned about the stability of resale prices for its herbicides; some Monsanto employees threatened to terminate Spray-Rite if it did not increase its prices; and Monsanto declined to renew Spray-Rite's contract. 684 F.2d at 1239, Pet. App. A-16. The court's characterization of the record regarding requests for termination is mistaken. *There is no evidence that any distributor requested Spray-Rite's non-renewal.*

[15] 684 F.2d at 1237, Pet. App. A-12 (emphasis added) (citations omitted). The court distinguished other decisions applying the rule of reason on the ground that the "plaintiffs in those cases *failed to allege* that the distributors' territorial restrictions were

(footnote continued on next page)

Because the court held that the allegation of a connection with price fixing compelled application of a *per se* rule, it did not inquire into the competitive effects of Monsanto's practices. Nor did it analyze whether there was any evidence connecting them to the alleged price fixing.

SUMMARY OF ARGUMENT

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19 (1977), establishes that the primary concern of antitrust policy is *inter*brand competition. It recognizes that non-price restrictions on *intra*brand competition can enhance interbrand competition by enabling a manufacturer to distribute its products more efficiently and compete more effectively. For those reasons, *Sylvania* holds that vertical non-price restrictions must be tested under the rule of reason.

In practical effect, the Seventh Circuit's decision reduces *Sylvania* to insignificance and vitiates the Sherman Act's crucial distinction between unilateral and concerted action. *First*, it holds that the mere allegation that non-price restrictions are part of a price-fixing conspiracy is enough to render the rule of reason inapplicable and to mandate application of a *per se* rule. *Second*, it permits the inference of a price-fixing conspiracy solely from evidence that a manufacturer, concerned about resale prices, terminated a distributor following price complaints from other distributors.

The decision will deter manufacturers from efficiently structuring their distribution systems and from adopting and enforcing procompetitive non-price restrictions. As *Sylvania* recognized, such restrictions are frequently used by manufacturers to implement marketing strategies requiring promotional activities by distributors. It is in that context, where some distributors may attempt to "free ride" by avoiding the cost of promotional activities, that distributor

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ancillary to *per se* unlawful price-fixing schemes." 684 F.2d at 1238 n.6, Pet. App. A-13 n.6 (emphasis added).

The Seventh Circuit's conspiracy standard unreasonably allows a jury to find a price-fixing conspiracy based on speculation. It permits the inference of conspiracy from normal marketplace occurrences—price complaints, price concern and termination—that are fully consistent with independent action. Such evidence is probative of conspiracy only if other evidence reasonably supports the inference that the manufacturer was acceding to the desires of complaining distributors in terminating the plaintiff, rather than exercising its independent business judgment.

Tested under the proper legal standards, neither the Seventh Circuit's decision nor the verdict with respect to price fixing and Monsanto's non-price programs can stand. The evidence does not establish either that Monsanto engaged in a price-fixing conspiracy or that Monsanto's non-price programs were part of such a conspiracy.

I. Monsanto's Procompetitive Non-Price Practices Were Condemned Under an Improper *Per Se* Rule and Were Not Part of Price Fixing.

In *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-52, 57 (1977), this Court held that vertical non-price restrictions must be tested under the rule of reason because of "their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition." The Seventh Circuit's decision severely confines *Sylvania*, holding that it "applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices."[16] 684 F.2d at 1237, Pet. App. A-12. Where such an allegation is made, the court of appeals held that "*Sealy* and its progeny prescribe the *per se* rule." *Id.* Applying that improper standard, the court condemned Monsanto's promotional programs and distribution policies without inquiry into their

[16] One commentator has remarked that "[i]f this language is to be credited there is simply nothing left of *Sylvania*." Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 U.C.L.A. L. Rev. 1, 42-43 n.127 (1982).

termination, distributor price complaints and manufacturer concern about resale price levels are most likely. Thus, a manufacturer's use of non-price programs like Monsanto's will almost always give rise to the natural marketplace behavior that the Seventh Circuit held sufficient to establish a price-fixing conspiracy. Then, under the court's decision, an allegation that non-price programs are part of such a conspiracy will always warrant application of a *per se* rule.

The result here was the condemnation of non-price practices that had precisely the beneficial effects on interbrand competition contemplated by *Sylvania*. After Monsanto instituted its promotional programs and distribution policies, its market share increased at the expense of dominant manufacturers, and the market became less concentrated. Applying its *per se* rule based on a mere allegation, the Seventh Circuit held these programs and policies unlawful without considering their competitive effects and in the absence of any evidence linking them to the alleged price fixing. Applying its conspiracy rule, the court held that the requisite price-fixing conspiracy was proven by evidence of the termination of a distributor following price complaints.

The Seventh Circuit's mere allegation rule simply is not a rational test for distinguishing between those non-price restrictions that are part of unlawful price fixing and those that should be tested independently under the rule of reason. In the vertical context, this Court has defined *per se* unlawful price fixing as concerted action by a manufacturer and its distributors to control resale prices and prevent intrabrand price competition. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). Under the correct test, non-price restrictions should not be condemned as part of price fixing unless plaintiff establishes, first, that such a price-fixing conspiracy exists and, second, that the non-price restrictions were designed or used to achieve the prohibited effect on intrabrand price competition.

competitive effects or analysis of their relationship to the alleged price fixing. It did so on a record demonstrating their procompetitive effects and lacking any evidence linking them to the alleged price fixing.

A. *Sylvania* Establishes that Vertical Non-Price Restrictions Should Be Tested Under the Rule of Reason.

Sylvania was grounded in this Court's recognition that interbrand competition "is the primary concern of antitrust law," and that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." 433 U.S. at 52 n.19, 54. *See also Rice* v. *Norman Williams Co.*, __ U.S. __, 102 S. Ct. 3294, 3300 (1982).

The competitive benefits of vertical non-price restrictions are well supported by economic theory. "Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers." *Sylvania*, 433 U.S. at 54-55. In particular, "manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products." *Id.* at 55. These forms of non-price competition also benefit the consumer. For example, they may provide wider availability and selection of products, better product information, or more convenient and accessible service.[17] Thus, manufacturers and consumers share a common interest that these

[17] *See, e.g.*, Bork, *Vertical Restraints:* Schwinn *Overruled*, 1977 Sup. Ct. Rev. 171, 180-81 (1977); Meehan & Larner, *A Proposed Rule of Reason for Vertical Restraints on Competition*, 26 Antitrust Bull. 195, 206-09 (1981); White, *Vertical Restraints in Antitrust Law: A Coherent Model*, 26 Antitrust Bull. 327, 336-38 (1981).

promotional and service activities be provided as efficiently as possible.[18]

However, "[b]ecause of market imperfections such as the so-called 'free rider' effect, these services might not be provided by [distributors] in a purely competitive situation, despite the fact that each [distributor's] benefit would be greater if all provided the services than if none did." *Sylvania*, 433 U.S. at 55. Since promotional and service activities entail costs, individual distributors have an obvious incentive to avoid those costs, cut prices, and free ride on the efforts of other distributors who provide promotion and services.[19] In the long run, free riders will tend to drive out distributor-provided promotion and services, to the detriment of consumers and the manufacturer.[20]

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[18] Because these activities form part of the cost of distribution (the difference between the manufacturer's price to its distributors and their resale prices), it will always be in the interest of the manufacturer to minimize their cost. *Sylvania*, 433 U.S. at 56 n.24; Bork, 1977 Sup. Ct. Rev. at 188; Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 283 (1975).

[19] *See Sylvania*, 433 U.S. at 55; *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 743-45 (7th Cir. 1982); Bork, 1977 Sup. Ct. Rev. at 181; Meehan & Larner, 26 Antitrust Bull. at 206-09; Posner, 75 Colum. L. Rev. at 285; White, 26 Antitrust Bull. at 332.

[20] *See* Bork, 1977 Sup. Ct. Rev. at 181; Meehan & Larner, 26 Antitrust Bull. at 207-208; Posner, 75 Colum. L. Rev. at 284-85; Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. Law & Econ. 86, 91-92 (1960). In the short run consumers may be able to obtain product information and services from some distributors, but purchase the product at lower prices from free riders who do not provide those services. In the long run consumers suffer, as the services are driven from the market or must be provided by less efficient, more costly means. Thus, free riding ultimately makes products more expensive and less desirable. *See* Meehan & Larner, 26 Antitrust Bull. at 206-08;

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Vertical non-price restrictions channel distributors' efforts into more effective promotion of the manufacturer's product, thereby enhancing interbrand competition. In particular, they limit the incentive for free riding and induce distributors to provide the promotional activities and services essential to the effective marketing of the manufacturer's products.[21] These "redeeming virtues" convinced this Court in *Sylvania* that, to the extent such restrictions stimulate interbrand competition, they are to be encouraged under the antitrust laws, not condemned. 433 U.S. at 54. The Court therefore abandoned the formalistic *per se* rule of *Schwinn*[22] and restored the rule of reason standard for testing such restrictions. *Id.* at 59.

B. The Seventh Circuit's *Per Se* Rule Substantially Undermines *Sylvania*.

The Seventh Circuit's application of a *per se* rule to Monsanto's non-price practices cannot be reconciled with this Court's precedents. By making determinative the mere allegation that such practices are part of price fixing, the Seventh Circuit violated this Court's admonition in *Sylvania* that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather

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Telser, 3 J. Law & Econ. at 92-95; White, 26 Antitrust Bull. at 332-33.

[21] *Sylvania*, 433 U.S. at 54-55. *See also* authorities cited *supra* notes 17-20. Because "manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products," *Sylvania*, 433 U.S. at 56, they have no incentive to institute non-price restrictions merely to enhance distributors' profits. R. Bork, *The Antitrust Paradox* 290 (1978); Posner, 75 Colum. L. Rev. at 283, 287-288.

[22] *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

than . . . formalistic line drawing."[23] Basing a *per se* rule on a bare allegation is the ultimate formalism. An allegation simply is not a rational criterion for identifying those practices "which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal." *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958).

The decision below will retard the procompetitive development of federal antitrust policy regarding vertical non-price restrictions and will deter their use by manufacturers. "Such restrictions, in varying forms, are widely used in our free market economy" and their antitrust legality is therefore "of considerable commercial importance." *Sylvania*, 433 U.S. at 57, 49. A manufacturer who uses them is always vulnerable to a facile claim that they "affect" price or restrict intrabrand price competition, particularly where they are used as part of a marketing strategy emphasizing non-price as well as price competition. So long as juries are permitted to speculate whether such restrictions are part of "price fixing," the manufacturer who uses them always risks treble damage liability. The Seventh Circuit's decision multiplies that risk, first, by prescribing an extreme *per se* rule based solely on the allegation of linkage to price fixing and, second, by permitting the inference of the underlying "price-

[23] 433 U.S. at 58-59. This Court's antitrust decisions repeatedly have emphasized that the classification of particular conduct as *per se* unlawful must be based on a careful analysis of its substance and competitive impact, not on formalism. *See, e.g.*, *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9, 19-20 (1979); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57-59 (1977). *See also United States* v. *Sealy, Inc.*, 388 U.S. 350, 352-54 (1967).

fixing" conspiracy from normal market behavior flowing from the use of non-price programs.[24]

C. Vertical Non-Price Restrictions Should Not Be Condemned as Part of Price Fixing Absent Proof That They Were Designed or Used to Implement Price Fixing.

Sound antitrust policy requires a rational test for distinguishing between those vertical restrictions that are part of unlawful price fixing and those that should be tested independently under the rule of reason.[25] Under this Court's

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[24] The resulting threat to the antitrust policy underlying *Sylvania* has been succinctly described:

> Because of the enormous attraction of litigating under a *per se* rule, virtually every plaintiff now alleges that nonprice restrictions are horizontal and that vertical restrictions are intended to control price. These distinctions have caused considerable confusion in the lower courts, confusion that threatens to obscure the analytically important insights of *Sylvania* itself.

Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 Va. L. Rev. 1457, 1463 (1981). *See also* Liebeler, 30 U.C.L.A. L. Rev. at 40-48 & n.127; Pollock, *Customer Restrictions and Refusals to Deal in the New Age of Reason*, 13 Toledo L. Rev. 559, 563 (1982).

[25] There is substantial authority that resale price fixing itself does not warrant *per se* condemnation. *See, e.g.*, R. BORK, *The Antitrust Paradox* at 288-98; Baker, 67 Va. L. Rev. at 1465-68; Bork, 1977 Sup. Ct. Rev. at 190-92; Carr, *Some Reflections on Vertical Restraints*, 13 Toledo L. Rev. 587, 589-92 (1982); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 9-14 (1981); Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 7-10 (1977). The amicus brief filed by the United States in support of Monsanto's petition for certiorari urges that all vertical restrictions "are sufficiently

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precedents, vertical non-price restrictions should not be condemned as part of price fixing unless it is established both that an unlawful price-fixing scheme exists and that the restrictions were designed or used to implement that scheme.[26] Absent proof of such linkage, non-price restrictions should be tested under the rule of reason. Only then can manufacturers be afforded realistic freedom to adopt procompetitive distribution practices, as the Court intended in *Sylvania*.

The common core of this Court's vertical price-fixing decisions is the condemnation of concerted action by a manufacturer and its distributors to control resale prices and prevent intrabrand price competition. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911).[27] The Court has proscribed non-price practices as part of a price-fixing scheme only upon proof that such a scheme exists and that the non-price practices were designed or used to implement the manufacturer's control of distributors' prices and to prevent intrabrand price competition.

Thus, the Court has struck down customer restrictions that directly effectuated control of resale prices by confining distribution of the manufacturer's products to wholesalers and

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similar in their basic competitive characteristics that the rationale of this Court's decision in *Sylvania*—that *per se* rules should be applied only to practices that are clearly anticompetitive in almost every situation—compels the conclusion that resale price maintenance activities, too, should be analyzed under the rule of reason." (U.S. Amicus Brief at 15).

[26] The Court did not address this issue in *Sylvania*, where price-fixing claims were resolved against plaintiff at trial and not raised in this Court.

[27] *See infra* pp. 41-45.

retailers who maintain prices fixed by the manufacturer.[28] The Court also has condemned non-price mechanisms for detecting sales below fixed prices and identifying the offending wholesaler or retailer, thereby enabling the manufacturer to police compliance with a price-fixing scheme.[29]

The Court has applied the same standard to non-price restrictions challenged as part of horizontal price fixing. For example, in *United States* v. *Sealy, Inc.*, 388 U.S. 350, 356 (1967), territorial restrictions were condemned as "part of the unlawful price-fixing and policing" grounded on "specific findings of the District Court [that] they gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions."

Absent proof that vertical non-price restrictions are an integral part of price fixing, the Court has required that they be tested independently under the rule of reason. Thus, in

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[28] *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 45 (1960) (enlisting wholesalers to stop the flow of products to retailers who deviated from suggested resale prices effectuated a resale price-fixing scheme); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 720 (1944) (agreements with wholesalers to resell only to licensed retailers were illegal as an "integral part of the whole distribution system," which required licensed retailers to maintain prices); *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (permitting wholesalers to deal only with retailers who maintained suggested resale prices was part of a price-fixing scheme); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911) (written agreements allowing wholesalers to sell only to licensed retailers who had entered into price maintenance agreements with the manufacturer were part of a price-fixing scheme).

[29] *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 454 (1922) (using a coding system to track the source of products sold by price cutters and refusing to sell to price cutters "[i]n its practical operation . . . necessarily constrains the trader, if he would have the products of the Beech-Nut Company, to maintain the prices 'suggested' by it.").

White Motor Co. v. *United States*, 372 U.S. 253 (1963), the Court refused to apply a *per se* rule to defendant's territorial and customer restrictions, despite an uncontested finding of price fixing. The Court did not regard that finding as dispositive because the trial court had made no finding that the restrictions were an integral part of the price fixing:

> In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly restrained. Such was *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, where price fixing was "an integral part of the whole distribution system" (*id.*, 720) including customer restrictions. No such finding was made in this case....

372 U.S. at 260.

Evidence that vertical non-price restrictions have an "effect" on price or restrict intrabrand competition is not enough to link them to price fixing. All such restrictions have some indirect effect on the level of intrabrand prices.[30] In *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 23 (1979), this Court made clear that "[n]ot all arrangements... that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints." Moreover, the Court fully understood in *Sylvania* that "[v]ertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers." 433 U.S. at 54. This Court nevertheless concluded that such restrictions must be tested under the rule of reason.

In sum, unless non-price restrictions are designed or used to implement a scheme to control resale prices and prevent intrabrand price competition, they must be tested under the

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[30] *See, e.g.*, Baker, 67 Va. L. Rev. at 1467; Liebeler, 30 U.C.L.A. L. Rev. at 45-46; Pollock, 13 Toledo L. Rev. at 563. Indeed, because virtually all non-price restrictions affect price, a rule condemning them on that basis "is flatly inconsistent with *Sylvania*." Baker, 67 Va. L. Rev. at 1467.

rule of reason. Proof that such restrictions affect price or limit intrabrand price competition is not enough to connect them with price fixing.

D. The Record Does Not Support the Verdict That Monsanto's Non-Price Practices Were Part of Price Fixing.

Since the Seventh Circuit held that the bare allegation of a connection with price fixing was determinative, it failed to analyze whether Monsanto's promotional programs and distribution policies were anticompetitive or were designed or used to implement price fixing. Had it done so, the court would have been compelled to reverse the denial of Monsanto's motion for a directed verdict.

There is no evidence that Monsanto's programs and policies were designed or used for the purpose of fixing resale prices. To the contrary, there is unrebutted evidence that they were unilaterally adopted by Monsanto for their self-evident purpose of encouraging distributors to carry out Monsanto's marketing strategy. (Tr. 1665-73, 1679-81, 3243-45). Thus, Monsanto designed its programs and policies to induce distributors to promote the sale of Monsanto herbicides to retail dealers in their areas of responsibility, stock dealers' shelves early in the selling season, educate dealers and farmers on the technical advantages of Monsanto's products, and provide technical advice. (Tr. 1665-73, 3246-49, 3294-98; PX 136, J.A. 43-45, Tr. 4208).

Spray-Rite presented no evidence explaining how these programs and policies supported or logically could support price fixing. Spray-Rite's expert hypothesized that, by rewarding distributors for selling to dealers, the incentive programs would "tend to discourage sales focus or sales efforts" with non-dealers when product was in short supply and would "influence" distributors' resale prices. (Tr. 2674-79, 2908-09, 3018-21). He conceded that when product was in

ample supply, as it was virtually without exception, Monsanto's programs would not cause a distributor to decline a sale to a non-dealer. (Tr. 2908-13).

As a matter of law and economics, Monsanto's incentive programs could not have implemented a price-fixing scheme. The prices a manufacturer charges its distributors necessarily influence their resale prices, but such an effect does not constitute "price fixing." *Cf. Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9, 23 (1979). Even if Monsanto's programs had precluded sales to non-dealers (which they did not), they could not have contributed to controlling distributors' resale prices or preventing intrabrand price competition. Those programs left distributors complete freedom to compete for sales to dealers and to determine their own resale prices. Unlike the restrictions in *Sealy* and *Bausch & Lomb*, Monsanto's programs did not insulate distributors from price competition, nor did they confine the distribution of Monsanto's products to distributors or dealers who agreed to sell at fixed prices.

Regarding Monsanto's primary responsibility areas and shipping policies, Spray-Rite's expert theorized that they "precluded" distributors from selling outside their designated areas because they increased shipping costs. (Tr. 2668). Even crediting that opinion, those territorial policies could not have contributed to a price-fixing scheme. Precluding extraterritorial sales would prevent intrabrand competition and might facilitate resale price control if the restrictions created "enclaves" in which distributors were insulated from price competition. *Cf. United States* v. *Sealy, Inc.*, 388 U.S. 350, 356 (1967). It could not have had those effects here, where Monsanto assigned from 10 to 20 distributors to each area of primary responsibility.

Moreover, uncontested marketplace evidence establishes that Monsanto's programs and policies did not have the preclusive effects hypothesized by Spray-Rite's expert. While these programs and policies induced distributors to

concentrate on selling to dealers within their areas of responsibility, distributors continued to sell substantial quantities of Monsanto products to non-dealers and to customers outside their areas. (DX 287, Tr. 3434, 3802, 3803; DX 288, Tr. 3434, 3802, 3803; DX 466, J.A. 102-08, Tr. 3805, 3806). *There is no evidence that any distributor ever declined to sell to a non-dealer or to a customer outside its area because of Monsanto's promotional programs or shipping policies.*

At bottom, Spray-Rite's theory is that Monsanto's non-price practices supported price fixing because they operated as customer and territorial restrictions and had an "effect" on resale prices. (Tr. 3986-88). Those hypothetical effects do not establish a connection with price fixing or justify *per se* condemnation of Monsanto's practices. In *Sylvania*, this Court recognized that non-price restrictions reduce intrabrand competition, including price competition, but nevertheless concluded that they should be tested under the rule of reason. 433 U.S. at 36, 54.

Monsanto's non-price practices could not have been condemned under the rule of reason. The incentive programs induced distributors to focus on promotional and informational activities that Monsanto considered essential to its becoming an effective competitor. The primary responsibility areas and shipping policies encouraged distributors to develop the market potential for Monsanto herbicides within those non-exclusive areas and contributed to the efficiency of product movement. All of these practices benefitted consumers by providing better product information, increasing the availability of Monsanto products on retailers' shelves, and increasing the efficiency of Monsanto's distribution system. (Tr. 1513, 1563-65, 1665-73, 1680-81, 2479-81, 3244-49).

There simply is no question that Monsanto's marketing strategy enhanced interbrand competition. Economic theory teaches that the procompetitive interbrand effects of vertical

non-price restrictions are manifested by an increase in a firm's output and market share:

> If its output expanded, the restriction must have made the firm's product more attractive to consumers on balance, thereby enabling the firm to take business from its competitors. This is an increase in interbrand competition and hence in consumer welfare, which is the desired result of competition.

Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 21 (1981).[31] This test was met. In 1968, before Monsanto adopted the challenged programs and policies, it was a weak competitor facing entrenched rivals. It was confronted with a choice between improving its competitive position or quitting the market. By 1972 Monsanto had become an effective competitor. Its sales increased; its market share improved; market concentration declined; and industry output increased.

In sum, Monsanto's non-price practices worked exactly as contemplated in *Sylvania*. Because Spray-Rite failed to present any evidence linking them to price fixing, the judgment that they were part of price fixing cannot stand.[32]

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[31] *See generally Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 446 U.S. 1, 19-20 (1979); 2 P. Areeda and D. Turner, *Antitrust Analysis*, ¶ 405c at 280-81 (1978); G. Stigler, *The Organization of Industry* 42 (1968); Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 901-02 (1981); Landes & Posner, *Market Power in Antitrust Cases*, 94 Harv. L. Rev. 937, 972-74 & n.57 (1981).

[32] Reversal of any aspect of the district court's judgment will require reconsideration of the damage award, since Spray-Rite premised its damage theory on the combined effects of the various programs and policies, the non-renewal and a post-termination boycott. As the Seventh Circuit itself has held, "[i]t is essential that damages reflect only the losses attributable to unlawful competition." *MCI Communications Corp.* v. *American Telephone and Telegraph Co.*, 1982-3 Trade Cas. (CCH)

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II. The Price-Fixing Verdict Was Affirmed Under an Improper Conspiracy Rule and Cannot Be Sustained on Any Theory of *Per Se* Unlawful Price Fixing.

The Seventh Circuit affirmed the jury's finding of a *per se* unlawful price-fixing conspiracy on the ground that such a conspiracy may be inferred solely from evidence that a manufacturer, concerned about resale prices, declined to renew a distributor after receiving price complaints from other distributors. Holding that "termination following competitor complaints is sufficient to support an inference of concerted action," 684 F.2d at 1238, Pet. App. A-15, the court neither required nor identified any evidence probative of a causal connection between the complaints and the non-renewal. Nor did the court address whether Spray-Rite had proven a price-fixing conspiracy as defined by this Court. Indeed, the unrebutted record of pervasive, vigorous price competition among Monsanto distributors belies the existence of such a conspiracy.

The Seventh Circuit's conspiracy rule is improper for two fundamental reasons. First, it vitiates the Sherman Act's crucial distinction between unilateral and concerted action by permitting a jury to infer conspiracy from normal marketplace behavior that is fully consistent with unilateral conduct. Second, it departs substantially from this Court's precedents by sustaining a verdict of *per se* unlawful price fixing in the absence of any evidence of actual agreement to fix prices or circumstantial evidence that distributors' resale prices were controlled and that intrabrand price competition was prevented. The practical effect of the decision is to expose a manufacturer to *per se* liability whenever it terminates a distributor, thereby deterring independent, procompetitive conduct.

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¶ 65,137 at 71,414 (7th Cir. 1983). *See also Berkey Photo, Inc.* v. *Eastman Kodak Co.*, 603 F.2d 263, 304 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

A. The Seventh Circuit's Standard Is Based on Factors Not Probative of Conspiracy and Will Deter Procompetitive Conduct.

Here, as in any Section 1 conspiracy case, the threshold question is whether the defendant's conduct "stemmed from independent decision or from an agreement, tacit or express." *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954). Absent direct evidence of agreement, a conspiracy may be proven by circumstantial evidence only if that evidence is "significantly probative of conspiracy." *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288 (1968). Circumstantial evidence is not probative of conspiracy unless it makes the hypothesis of concerted action more probable than that of unilateral action. Thus, in affirming summary judgment for the defendant in *First National Bank* the Court reasoned:

> [N]ot only is the inference that Cities' failure to deal was the product of factors other than conspiracy at least equal to the inference that it was due to conspiracy, *thus negating the probative force of the evidence showing such a failure*, but the former inference is more probable.

391 U.S. at 280 (emphasis added).

Underpinning *First National Bank* is the fundamental principle that conspiracy cannot reasonably be inferred from behavior that can naturally flow from the exercise of independent judgment. This principle follows directly from the maxim that a jury is allowed to draw only "reasonable inferences from facts proven in evidence having a reasonable tendency to sustain them." *Galloway* v. *United States*, 319 U.S. 372, 396 (1943). Circumstantial evidence that is consistent with independent behavior contributes nothing toward the identification of concerted action and thus has no "reasonable tendency to sustain" an inference of conspiracy.

This principle applies in any antitrust case. Where a vertical conspiracy to terminate a distributor is alleged, circumstantial evidence that points "with at least as much force toward unilateral actions" is insufficient as a matter of law to support an inference of conspiracy. *Venture Technology, Inc.* v. *National Fuel Gas Distribution Corp.*, 685 F.2d 41, 48 (2d Cir.), *cert. denied*, __ U.S. __, 103 S. Ct. 362 (1982). Similarly, in the horizontal context consciously parallel business behavior is insufficient proof of conspiracy "unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978).[33] In short, business behavior expected of a firm acting unilaterally is not proof of a conspiracy in restraint of trade.

The Seventh Circuit's conspiracy rule violates this principle. It permits the inference of a price-fixing conspiracy from three neutral circumstantial facts: (1) the termination of a distributor, (2) the manufacturer's concern about resale prices, and (3) the manufacturer's receipt of price complaints about a distributor from its rivals. 684 F.2d at 1239, Pet. App. A-15 to 16. Each of these occurs normally

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[33] *See also Proctor* v. *State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 327 (D.C. Cir.) (agreement may be inferred from parallel conduct "[o]nly when the observed parallel behavior is inconsistent with the behavior to be expected from each actor . . . pursuing [his] own economic interest"), *cert. denied*, __ U.S. __, 103 S. Ct. 86 (1982); *Southway Theatres, Inc.* v. *Georgia Theatre Co.*, 672 F.2d 485, 493-96 (5th Cir. 1982) (parallel refusals to deal have "no significant probative force" where independent business judgment would similarly have resulted in each defendant's refusal to deal); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 658 (1962) (parallel business behavior "is not even evidence of agreement unless there are some other facts indicating that the decisions of the alleged conspirators were *interdependent*").

in a competitive market and is fully consistent with unilateral behavior. Neither separately nor collectively are these circumstantial facts "significantly probative" of a price-fixing conspiracy.

First, the termination of a distributor is not indicative of conspiracy, since manufacturers terminate distributors in the ordinary course of business for a host of independent reasons.[34] For example, in order to protect its marketing strategy a manufacturer might terminate a distributor who refuses to provide promotion, service or other forms of non-price competition that are part of that strategy.[35] Thus, the termination or replacement of distributors is an essential and normal aspect of the competitive process.

Second, evidence of a manufacturer's concern about resale prices, when added to the fact of termination, does not make the hypothesis of conspiracy any more plausible. All manufacturers have a natural interest in resale prices. For example, a manufacturer who requires promotional activities will be concerned that price cutting by free riders will undercut the ability and incentive of other distributors to undertake those activities. Far from evidencing conspiracy, this concern simply reflects the manufacturer's legitimate, independent interest in the success of a procompetitive strategy.[36] Evidence of a manufacturer's price concern therefore contributes nothing toward the identification of concerted action.

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[34] Unilateral termination, whatever its motivation, does not violate Section 1 of the Sherman Act. *See United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919).

[35] *See, e.g., Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 945 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S. Ct. 176 (1982).

[36] *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d at 743-44; *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946, 953, 956 (2d Cir.), *cert. denied*, ___ U.S. ___, 103 S. Ct. 362 (1982);

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Third, price complaints from rival distributors add no probative force to evidence of price concern and termination.[37] Such complaints are natural—and from the manufacturer's perspective unavoidable—reactions by distributors to the activities of their rivals. They are more likely where the manufacturer requires promotion, service and other forms of non-price competition that entail costs for distributors. Distributors who incur these costs will naturally complain about the price cutting of a perceived free rider.[38] In sum, price complaints "arise in the normal course of business and do not indicate illegal concerted action." *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *reh'g en banc granted*, No. 81-1562 (8th Cir. May 21, 1982).

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H.L. Moore Drug Exchange, v. *Eli Lilly & Co.*, 662 F.2d at 943; Meehan & Larner, 26 Antitrust Bull. at 217. Thus, "[i]t is unrealistic to expect the manufacturer that uses [vertical] restrictions in order to limit free riding to be indifferent to the dealer that circumvents the intent of the [restrictions] by discounting." Posner, 48 U. Chi. L. Rev. at 12.

[37] *See, e.g., Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856 (1st Cir. 1982); *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (8th Cir. 1982), *reh'g en banc granted*, No. 81-1562 (8th Cir. May 1, 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d at 943-44 & n.8; Baker, 67 Va. L. Rev. at 1507; Posner, 48 U. Chi. L. Rev. at 13. Price complaints are merely an aspect of the essential dialogue between a manufacturer and its distributors in a competitive market. Distributors are a valuable source of information about competitive conditions and the effectiveness of distribution programs. *See, e.g.*, Liebeler, 30 U.C.L.A. L. Rev. at 10; Meehan & Larner, 26 Antitrust Bull. at 204-05; Comment, *Vertical Agreement as Horizontal Restraint:* Cernuto, Inc. v. United Cabinet Corp., 128 U. Pa. L. Rev. 622, 647 n.151 (1980).

[38] *See, e.g., Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1199-1200 (6th Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3421 (U.S. November 19, 1982) (No. 82-848); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d at 744; Posner, 48 U. Chi. L. Rev. at 13.

The Seventh Circuit's holding that such marketplace behavior establishes conspiracy will inevitably deter procompetitive business conduct. A manufacturer who has received price complaints will be inhibited from terminating a distributor or enforcing distribution restrictions, regardless of the business justification. A distributor who has been identified as a price cutter thus may be able "to violate lawful provisions of the [distributorship] agreement with impunity, because the enforcement of *any* provisions against it may be deemed to have been motivated by its discounting." Posner, 48 U. Chi. L. Rev. at 12. In effect, the court's rule gives such a distributor a contract in perpetuity.

The anticompetitive impact of the Seventh Circuit's conspiracy rule will be greatest where a manufacturer adopts non-price restrictions to induce distributor promotional activities. Having adopted such a marketing strategy, the manufacturer has an interest in enforcing it, even to the extent of terminating a distributor who refuses to provide the required promotion. The manufacturer will be concerned about its distributors' prices, since price cutting is a clue that a distributor may not be providing the required promotional activities.[39] Independent of the manufacturer's concern, distributors who incur the costs of promotional activities may have complained about the price cutting of a perceived free rider. Thus, the three factors cited by the Seventh Circuit as sufficient to establish conspiracy—termination, price concern, and complaints—are most likely to be present when a distributor refuses to comply with procompetitive non-price programs.

In practical effect, the Seventh Circuit's rule restricts manufacturers' ability to use and enforce the types of non-

[39] *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d at 744; Liebeler, 30 U.C.L.A. L. Rev. at 25.

price programs endorsed by *Sylvania* as enhancing interbrand competition and promoting consumer welfare.[40] Since the benefits of these programs can be realized only if distributors comply with them, *Sylvania* necessarily implies the manufacturer's freedom to enforce them. Only by requiring proof of a causal link between distributor complaints and manufacturers' termination decisions can this Court ensure that private antitrust actions by terminated distributors will not subvert *Sylvania*.

B. The Evidence Does Not Establish a Causal Connection Between Distributor Complaints and Termination and Therefore Is Not Probative of Conspiracy.

To be probative of conspiracy, the circumstances of a distributor termination must establish a causal nexus between the complaints of other distributors and the manufacturer's decision to terminate. *Cf. Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Because distributor terminations, manufacturers' price concerns, and price complaints occur normally and independently in a competitive market, these facts alone cannot establish that causal nexus. They take on probative significance only in the context of other facts or circumstances.[41] *See, e.g., H.L. Moore Drug Exchange* v.

[40] The pernicious impact of the Seventh Circuit's decision is exemplified by the court's condemnation of Monsanto's non-price programs as part of a price-fixing conspiracy. One commentator has described the decision as the "most egregious" example of how far the lower courts have strayed from *Sylvania*. Liebeler, 30 U.C.L.A. L. Rev. at 42-43 n.127.

[41] The inquiry in a vertical conspiracy case based on termination following complaints is thus analogous to that in horizontal conspiracy cases premised on a theory of conscious parallelism. *See, e.g., First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 280, 288-89 (1968); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41 (1954). Even where parallel behavior is accompanied by evidence of contacts among the defendants, "it is necessary to review plaintiffs' other

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Eli Lilly & Co., 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, ____ U.S. ____, 103 S. Ct. 176 (1982).

Under a proper conspiracy standard, plaintiff should be required to adduce additional evidence from which a jury could reasonably infer that the manufacturer was acceding to the desires of the complaining distributors rather than exercising its own independent business judgment in terminating the plaintiff. *See Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (7th Cir. 1982). Evidence that both the complaining distributors and the manufacturer desired to terminate plaintiff is not sufficient. So long as the termination is consistent with the manufacturer's exercise of independent business judgment, the coincidence of that business decision with other distributors' interests does not provide the requisite causal nexus. *Id.* at 744. *See also* Comment, *Vertical Agreement as Horizontal Restraint*: Cernuto, Inc. v. United Cabinet Corp., 128 U. Pa. L. Rev. 622, 647 (1980).

In affirming the price-fixing conspiracy verdict on the basis of Monsanto's concern about prices, distributor price complaints and the non-renewal, the Seventh Circuit neither required nor identified any evidence probative of a causal connection between the complaints and the non-renewal.[42]

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evidence before the importance of the contacts between defendants and the inferences the jury might legitimately draw therefrom may be determined." *Venzie Corp.* v. *United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975).

[42] In addition to the evidence of non-renewal and price complaints, the court cited evidence reflecting Monsanto's concern about resale prices: that Monsanto desired _ore stable resale prices for its products, that Monsanto employees complained about Spray-Rite's prices on several occasions, and that Monsanto employees threatened on two occasions to terminate Spray-Rite because of its price cutting. 684 F.2d at 1239, Pet. App. A-16. Such evidence does not support the inference that Monsanto was acceding to complaining distributors rather than exercising its independent judgment.

The record contains no such evidence. Furthermore, the Seventh Circuit ignored undisputed evidence "negating the probative force" of Spray-Rite's circumstantial evidence and making "more probable" the inference that Monsanto declined to renew Spray-Rite for its own independent business reasons. *First National Bank* v. *Cities Service Co.*, 391 U.S. at 288.

First, the long interval between the complaints and the non-renewal makes the inference of a causal relationship unreasonable.[43] The final price complaint about Spray-Rite came fifteen months before its non-renewal, and Monsanto had renewed Spray-Rite's distributorship after that complaint. There was no evidence that Monsanto consulted with any other distributor during this fifteen-month period regarding Spray-Rite's pricing or the non-renewal of its contract.

Second, there is no evidence that Monsanto engaged in a pattern or practice of terminating price cutters following complaints, even though price complaints about distributors were "standard practice." (Tr. 184). Indeed, Monsanto had continued Spray-Rite's distributorship from 1957 until late 1968, even though it was always aware Spray-Rite was a price cutter and had received price complaints about Spray-Rite as early as 1964. (Tr. 92, 111-13, 115-18, 127-29, 1397-1400, 3626-3631). That Monsanto regularly received price complaints but did not terminate other distributors undermines the inference that it was acceding to the desires

[43] *See, e.g., H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 944 (2d Cir. 1981) (reversing jury verdict and entering judgment for defendant where complaints preceded termination by over two years), *cert. denied*, ____ U.S. ____, 103 S. Ct. 176 (1982). *Cf. Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 114 (3d Cir. 1980) (affirming directed verdict for defendant), *cert. denied*, 451 U.S. 911 (1981).

of complaining distributors when it declined to renew Spray-Rite.[44]

Third, there is no evidence that any of Monsanto's distributors were able to influence Monsanto's choice of distributors or that the distributors who complained about Spray-Rite possessed or exerted coercive power over Monsanto. Nor is there any evidence that any distributor requested Spray-Rite's non-renewal. The lack of any evidence of coercive power further negates an inference of conspiracy.[45]

Finally, the Seventh Circuit failed to consider undisputed evidence that the non-renewal of Spray-Rite was consistent with Monsanto's marketing strategy requiring promotional and educational activities by distributors. Monsanto had announced in late 1967 that distributors would be evaluated for renewal based upon their promotional efforts with dealers and employment of trained salesmen capable of carrying out Monsanto's technical education programs. (Tr. 3237-40; PX 196, J.A. 59-60, Tr. 157-58, 199). Spray-Rite failed to implement key elements of Monsanto's marketing strategy by refusing to hire salesmen and failing to emphasize the sale of Monsanto products to dealers. (Tr. 1059-63, 1106-07, 1682, 3829). Monsanto declined to renew Spray-Rite's contract only

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[44] *See, e.g., Schwimmer* v. *Sony Corp. of America*, 677 F.2d at 954 (affirming judgment n.o.v. for defendant where there was no evidence defendant had ever terminated other distributors following complaints).

[45] *See, e.g., Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d at 1199 (affirming verdict for defendant where plaintiff adduced "no evidence that would establish dealer coercion"); *Blankenship* v. *Herzfeld*, 661 F.2d 840, 845 (10th Cir. 1981) (affirming judgment for defendant where "defendants were not in any position to coerce or exert substantial leverage" on the manufacturer); *A.H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302, 1307 (9th Cir. 1981) (affirming summary judgment for defendant where plaintiff "advanced no evidence of dealer coercion").

after it had failed to satisfy these key elements of Monsanto's renewal criteria. (Tr. 3825-26).[46]

The Seventh Circuit justified its disregard of this evidence on the ground that while "the evidence concerning Monsanto's reasons for terminating Spray-Rite was conflicting, the jury was not required to accept Monsanto's version of the case." 684 F.2d at 1239, Pet. App. A-17. This begs the question. It would not have been sufficient for Spray-Rite to have discredited business reasons advanced by Monsanto to justify its termination decision. If a plaintiff fails to adduce evidence that the manufacturer terminated it at the behest of other distributors, it has not met its burden of proof, and there is no issue for the jury.[47]

In sum, there is no evidence from which the jury could reasonably have inferred that Monsanto acceded to desires of complaining distributors in terminating Spray-Rite, and unrebutted evidence negates that inference. In sustaining the conspiracy verdict solely on the basis of normal marketplace behavior, the Seventh Circuit violated the fundamental principle that "mere speculation be not allowed to do duty for probative facts." *Galloway* v. *United States*, 319 U.S. 372, 395 (1943). Here, the jury's finding of a conspiracy could have been based only on impermissible speculation.

C. The Record Does Not Support the Price-Fixing Conspiracy Verdict.

The Seventh Circuit's error goes beyond permitting the inference of a conspiracy from evidence equally consistent with unilateral business conduct. Its holding that Spray-Rite had proven a price-fixing conspiracy is fundamentally

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[46] One commentator has described Monsanto's termination of Spray-Rite as "clearly consistent with alleviating the free rider problems of the type described in *Sylvania*." Liebeler, 30 U.C.L.A. L. Rev. at 42-43 n.127.

[47] *See, e.g.*, *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d at 941; *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975).

inconsistent with this Court's vertical price-fixing decisions. Those decisions define *per se* unlawful price fixing as concerted action by a manufacturer and its distributors to control resale prices and prevent intrabrand price competition. *See, e.g., California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911). The Court has condemned as vertical price fixing only those types of concerted behavior that have that purpose or effect.

In *Dr. Miles*, the Court's first vertical price-fixing decision, a manufacturer's express written agreements with all of its wholesalers and dealers fixing their resale prices were held *per se* unlawful. The Court reasoned that such agreements could fare no better than horizontal agreements among the dealers because they had "for their sole purpose the destruction of competition and the fixing of prices." 220 U.S. at 408. *See also California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. at 103 (holding a state's resale pricing statute *per se* unlawful because it gave producers "the power to prevent price competition by dictating the prices charged by wholesalers"); *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 21 (1964) (holding *per se* unlawful consignment contracts "used to cover a vast gasoline distribution system, fixing prices through many retail outlets").

Subsequent decisions extended the *per se* price-fixing rule to include implied agreements having the purpose or effect of pervasive resale price maintenance. In *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), for example, the defendant prescribed its wholesalers' resale prices and required licensed retailers to maintain locally prevailing prices. The Court held that a price-fixing conspiracy was perfected when the wholesalers "accepted [defendant's] proffer of a plan of distribution by cooperating in prices, limitation of sales to and approval of retail licensees." *Id.* at 723. *See also Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 457 (1940) (affirming a finding of *per se* unlawful price fixing where the manufacturer and its refiner-wholesalers created

"a combination capable of use, and actually used, as a means of controlling jobbers' prices and suppressing competition among them").

Finally, the Court has held that a manufacturer's use of coercive measures "which effect adherence to his resale prices" constitutes *per se* unlawful price fixing. *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960). In *Parke, Davis*, the defendant "used the refusal to deal with [its] wholesalers in order to elicit their willingness to deny Parke Davis products to retailers and thereby help gain the retailers' adherence to its suggested minimum retail prices." *Id.* at 45. The Court held that defendant had created an unlawful price-fixing combination by using coercion to achieve "uniform adherence" to its suggested prices. *Id.* at 45-47. *See also Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 455 (1922) (sustaining a finding of *per se* unlawful price fixing where "[t]he specific facts found show suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose").[48]

The Court has instructed that, before condemning conduct as *per se* unlawful price fixing, "it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing'." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979). Here, the evidence does not establish any of the categories of conduct this Court has held to

[48] The Court has also condemned a manufacturer's cooperation in horizontal price fixing by its dealers. In *United States* v. *General Motors Corp.*, 384 U.S. 127 (1966), dealers conspired among themselves and later enlisted General Motors' assistance to effectuate such a scheme. The Court concluded that by its cooperation General Motors had participated in a *per se* illegal conspiracy with its dealers. Here there is no evidence that Monsanto's distributors agreed among themselves to fix resale prices.

constitute a vertical price-fixing conspiracy. First, there is no evidence that Monsanto entered into written agreements with its distributors requiring resale price maintenance. Second, there is no evidence that distributors adhered to suggested resale prices. Third, there is no evidence that distributors acquiesced in any price coercion by Monsanto.

The evidence of price behavior in the herbicide market belies the existence of a price-fixing conspiracy. In contrast to the circumstantial evidence that this Court has held probative of such a conspiracy, the record here demonstrates no control of distributors' resale prices or prevention of intrabrand price competition. Uncontested evidence establishes intense price competition among Monsanto distributors both before and after Spray-Rite's non-renewal. (Tr. 455-56, 692-93, 1465, 2140, 2990, 3349-53, 3413). All of Monsanto's distributors regularly sold below suggested resale prices. (*See supra* note 9). No distributor, including Spray-Rite, ever conformed its resale pricing as a result of any alleged pressure from Monsanto. (Tr. 396-99, 457, 1218-19). In sum, there was no evidence from which the jury could reasonably have found a conspiracy to fix the resale prices of Monsanto herbicides.

By holding that a price-fixing conspiracy can be predicated solely on the termination of a single price cutter, even assuming concerted action, the Seventh Circuit created a new category of *per se* unlawful price fixing. It did so without considering whether such a termination "always or almost always" has the prohibited effect of controlling distributors' resale prices and preventing intrabrand price competition. *Broadcast Music, Inc.,* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9, 19-20 (1979). That inquiry is essential. The establishment of *per se* rules requires courts "to make broad generalizations about the social utility of particular commercial practices." *Sylvania*, 433 U.S. at 50 n.16. For this reason,

"[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972).

The Seventh Circuit neither relied upon "considerable experience" with the conduct it condemned as *per se* unlawful price fixing nor considered whether a "broad generalization" about the anticompetitive impact of such conduct is warranted. The likelihood that such conduct will result in the control of resale prices or the prevention of intrabrand price competition will depend upon the particular circumstances of each case. Indeed, the record of intense intrabrand price competition in this case demonstrates that the competitive significance of terminating a single distributor cannot be predicted apart from the context in which it occurs. A rule of reason inquiry, which "focuses directly on the challenged restraint's impact on competitive conditions," is therefore required. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 688 (1978).

Neither the price-fixing conspiracy verdict nor the Seventh Circuit's affirmance can be sustained. The evidence does not establish a *per se* unlawful price-fixing conspiracy as defined by this Court. Nor does the new category of conduct defined by the Seventh Circuit on this record as "price fixing" warrant *per se* condemnation.

CONCLUSION

In affirming the district court's denial of Monsanto's motion for a directed verdict with respect to both the alleged price fixing and Monsanto's non-price programs, the Seventh Circuit applied incorrect legal standards that will broadly affect the nation's business. Under the proper legal standards, no jury could reasonably have concluded that Monsanto conspired with any of its distributors to terminate Spray-Rite's distributorship or to fix prices. Nor could a jury

reasonably have concluded that Monsanto's non-price practices were designed or used to implement resale price fixing. Thus, neither issue should have been submitted to the jury. For the foregoing reasons, Monsanto respectfully requests that the judgment of the Seventh Circuit be reversed, with directions to remand to the district court for entry of judgment on behalf of Monsanto on both issues.

Respectfully submitted,

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Dated: May 14, 1983

No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY, *Petitioner,*

vs.

SPRAY-RITE SERVICE CORPORATION, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT SPRAY-RITE SERVICE CORPORATION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court should apply a rule of reason test to a trial in which the petitioner agreed to the *per se* test and submitted no other instructions?

2. Whether the Court, leaving aside Monsanto's position in the District Court, should overrule decisions of the Court which have applied a *per se* test to vertical price-fixing?

3. Whether there was sufficient evidence to sustain the jury's findings regarding defendant's *per se* violations of Section 1 of the Sherman Act?

4. Whether the Court in light of the extensive factual support for the jury's findings should use this case to resolve supposed conflicts between the circuits on the amount of proof necessary to establish a vertical price-fixing agreement?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT SPRAY-RITE SERVICE CORPORATION[1]

COUNTERSTATEMENT OF THE CASE[2]

I. Summary of Proceedings Below[3]

A. District Court

Respondent, Spray-Rite Service Corporation, charged petitioner, Monsanto Company, with violating Section 1 of the Sherman Act, 15 U.S.C. § 1, by fixing and stabilizing resale prices, restricting customers and territories, and wrongfully terminating and subsequently boycotting Spray-Rite. (Amended Complaint, Pars. 11a-d, 11g)

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[1] Pursuant to Rule 28.1, Spray-Rite Service Corporation states that it is a closely-held corporation which does not have any parent companies, subsidiaries or affiliates.

[2] Contrary to the Court's Rule 34(g), Monsanto's Statement of the Case bears no relationship whatsoever to the evidence of conspiracy presented to the jury.

[3] The following abbreviations are used in this Brief: "Pet. App." (Appendix to Petition for Certiorari); "J.A." (Joint Appendix of Petitioner and Respondent); "Tr." (Trial Transcript); "PX"

After five weeks of trial, the jury returned a verdict for plaintiff in the untrebled amount of $3,500,000. (Tr. Feb. 21, 1980, at 2) The jury also answered affirmatively each of three special interrogatories requested by Monsanto:

> Question No. 1:
>
> "Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices on Monsanto herbicides?"
>
> The answer is: "Yes."
>
> Question No. 2:
>
> "Were the compensation programs and/or areas of primary responsibility and/or shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?"
>
> The answer is: "Yes."
>
> Question No. 3:
>
> "Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto's herbicides after 1968?"
>
> The answer is: "Yes."

J. A. 27-28.

B. Court of Appeals

The Court of Appeals rejected Monsanto's belated contention that a rule of reason instruction was mandatory and held that the trial court properly instructed the jury that "Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful if undertaken as part of an illegal scheme to fix prices." (Pet. App. at 5-13) Citing specific evidence of illegal agreement, the Seventh Circuit then held that "[t]here was sufficient evidence to support the jury's verdict that Monsanto terminated Spray-

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(footnote continued)

(Plaintiff's Exhibit); "DX" (Defendant's Exhibit); "Cert. Pet." (Monsanto's Petition for Certiorari); "Pet. Br." (Brief of Petitioner Monsanto).

Rite pursuant to a conspiracy with other distributors to fix the resale price of Monsanto herbicides." (*Id.* at 16-17)

II. Summary of the Facts

A. The Results of Monsanto's Illegal Conspiracy Were Threefold.

Monsanto accomplished the three objectives of its illegal conspiracy. (*See, e.g.*, Tr. 2960) First, the two most aggressive and effective price-cutters were "squared away." (Tr. 1945-46, 1979) Spray-Rite was terminated in 1968, crippled through 1972 and eventually destroyed. (Tr. 225, 1322, 2854, 3029-30) Mid-State Chemical, the Spray-Rite of Minnesota, was also terminated. (Tr. 406-08, 451, 452[o]-53, 1948)

Second, Monsanto and its distributors stabilized the prices of its herbicides throughout the distribution system. (PX 139, J.A. 50-58) A Monsanto task force was therefore able to conclude after the 1970 season that there was "a relatively stable market with respect to price." (PX 139, J.A. 51) Michael Flynn, a Monsanto sales representative in Illinois during 1965-66 and 1969-70, testified that "prices were much more stable" during the latter seasons. (Tr. 217)

Third, the sales and profits of both Monsanto and its distributors skyrocketed. (Tr. 2960, 3250) By as early as 1970, the suggested distributor margin on Monsanto's Lasso was twice that of Geigy's Atrazine. (Tr. 1687-88) Stewart Daniels, second in command of Monsanto's Agricultural Division, testified that Monsanto wanted its distributors "to make as much money as they possibly can," and the distributors who wanted to remain distributors agreed. (Tr. 3328) Phil James therefore testified that distributor Midwest's pricing philosophy was to charge everything the market would bear and to "get the absolute top dollar that we can get." (Tr. 3685)

With Spray-Rite eliminated and prices stabilized, the sales and profits of its former competitors flourished. (Tr. 2960) Hopkins Chemical, which could not compete with

Spray-Rite until after the latter's termination, picked up the customers Spray-Rite could no longer supply and saw its sales soar from $500,000 in 1965 to $15 million in 1975 and $20 million in 1978. (Tr. 1372-75, 1448-49) Van Diest, who started in the herbicide business the same year as Spray-Rite and did not become a Monsanto distributor until 1973, had sales of $102 million in 1979. (Tr. 3720-21, 3762) In 1968, Van Diest purchased Monsanto herbicides from Spray-Rite, and Van Diest's sales that season were $2.1 million compared to Spray-Rite's $3.4 million. (Tr. 721, 3726) In 1975, Van Diest had pre-tax profits of $6,841,160 on sales of $56 million. (Tr. 3775)

The farmer-consumer was the victim of this conspiracy. (*See* PX 309, J.A. 73; Tr. 1646, 1651) Spray-Rite's prices and competition were favorable to the farmer. (Hopkins, Tr. 1377) With Spray-Rite eliminated, those same farmers paid the price for the soaring profits of Monsanto and its cooperating distributors. (Tr. 3775)

B. The Product Market: Herbicides Are Patented, Proprietary and Generally Non-Competitive.

The few herbicides manufactured during this period were the exclusive property of the manufacturer, and each possessed unique qualities or characteristics which were patented. (PX 137, J.A. 52, Tr. 1567; PX 139, J.A. 51, 57, Tr. 2635) Monsanto's task force concluded in its September 1970 Business Plan that "all major herbicides are proprietary with a single producer-seller...," and that "[t]hese compounds are the patented property of a handful of large companies marketing agricultural chemicals." (PX 139, J.A. 51, 57)

Monsanto's task force also found that all herbicides have "varying levels of activity and selectivity," and that its herbicides have very specific "geographic and/or crop limitations which affect their sale and distribution." (PX

137, J.A. 48; PX 139, J.A. 51) Monsanto's objectives were to concentrate on markets it could "dominate and capitalize on" and "[t]o develop and preserve to the greatest degree possible a proprietary position, or franchise, in the market place." (PX 139, J.A. 50, 56) In 1968, for example, Monsanto touted its "dominance" in granular application on corn, and by 1970 it claimed "a market franchise" of 89 to 93 percent of granular herbicide sales. (PX 139, J.A. 57; PX 140, Tr. 1607) Monsanto distributor Hopkins therefore testified that the herbicides of the various manufacturers were complementary, not competitive. (Tr. 1359-60, 1388) Donald Yapp, Spray-Rite's president, testified that the herbicides of different manufacturers were extremely different from each other, "do not compete" and were "entirely different kinds of products, for different jobs." (Tr. 511, 516-17, 532, 571-72, 579-82)

The herbicide industry was highly concentrated during this period. (PX 139, J.A. 52) Monsanto acknowledged in 1970 that "[c]ompetition for the herbicide treated acreage on corn and soybeans comes from a relatively few products manufactured and sold by large chemical companies." (PX 139, J.A. 52)[4]

High entry barriers also existed. (PX 139, J.A. 56, 58) Monsanto's task force therefore noted in 1970 that "[t]he cost of introducing a new product into this consumer market will discourage lesser companies . . . from entering," and that its strategy was to reach the point "where product manufacturing and promotion costs will deter all but the most aggressive competitors from entering the market with similar products." (*Id.*)

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[4] Monsanto's Business Plan 1970-1975 concluded:

> A "price war", as such, will not occur between manufacturers prior to 1975 because producers will become dependent upon one another and product mixtures.

PX 139, J.A. 58.

C. Monsanto Introduced Three Generations of Herbicides; The Most Successful, Lasso, Was Introduced Immediately After Spray-Rite's Termination.

In 1956, Monsanto introduced its first pre-emergent herbicide for corn and soybeans, Randox. (Tr. 3217) Randox was effective only against certain grasses in heavy soils (the "Randox Belt"), and its performance was "erratic" against other grasses and weeds in light soils. (PX 134, J.A. 38, Tr. 3034-35) Randox was also extremely irritational to the user. (Tr. 1289, 3218, 3308)

In 1966, Monsanto introduced its "second generation" corn herbicide, Ramrod. (Tr. 3308) Ramrod was viewed by Monsanto as "a substantial improvement over the first generation" Randox. Ramrod quickly supplanted Randox,[5] and the immediate demand for Ramrod caused Monsanto's "share" of the corn herbicide market to jump from 8.6 percent in 1965 to almost 14 percent in 1966. (PX 134, J.A. 38; Tr. 3034-35, 3338-39)

In 1969, Monsanto introduced its "third generation" corn and soybean herbicide, Lasso. (Tr. 1558, 3309) Monsanto praised Lasso as an improvement over Ramrod, and described Lasso as "the best grass control chemical on both corn and soybeans." (PX 139, J.A. 52; Tr. 1558) Monsanto therefore concluded in its 1970 Business Plan that it should "[p]hase out Ramrod; push Lasso" in an effort to "dominate and capitalize on" grass control. (PX 139, J.A. 56) As with the introduction of Ramrod in 1966, the entry of Lasso in 1969 caused Monsanto's "share" of the corn herbicide market to rise from almost 15 percent in 1968 to 22 percent in 1969. (DX 503, J.A. 115) Monsanto's assistant general manager testified that in both instances the reason for Monsanto's increased sales was its "new products," and he acknowledged that Monsanto's increased "share" of the soybean herbicide market "could certainly" have been due

[5] This resulted in a huge inventory carry-over of Randox at the distributor level. (Tr. 1071-75, 1464-65)

to the introduction of Lasso. (Tr. 3307, 3309-10; *accord,* PX 139, J.A. 51; Tr. 1375, 2994-95)

D. Spray-Rite, Monsanto's Tenth Largest Distributor, Actively and Effectively Promoted Monsanto's Herbicides and Provided Unequalled Service.

Spray-Rite began distributing agricultural chemicals in 1955. (Tr. 509) In 1957, Spray-Rite became an authorized distributor of Monsanto's Randox and Geigy's Atrazine. (Tr. 531-34, 537, 539) Although Spray-Rite received one-year contracts from Monsanto for 1957, 1965 and 1968, Monsanto sold its herbicides directly to Spray-Rite continuously from 1957 through 1968. (PX 167, 174, 201; Tr. 1069, 1222-24)

Approximately 90 percent of Spray-Rite's sales volume consisted of herbicide sales, and two-thirds of those sales were made each season by the end of January. (Tr. 758, 762) Spray-Rite concentrated its sales efforts in northern Illinois, southern Wisconsin and eastern Iowa, but it also sold in Minnesota, Nebraska, Missouri, Indiana and Ohio. (Tr. 549, 2124, 2128)

Spray-Rite was an efficient and effective low overhead distributor. (Tr. 221-23) It ordered in large quantities early in the season when prices were lowest, picked up orders to save freight, made its own deliveries, and employed the wife and children of its president and owner, Donald Yapp. (Tr. 221, 575-76) Flynn, Monsanto sales representative in Spray-Rite's trade area, testified that Spray-Rite "worked with a minimal amount of overhead," could sell herbicides at lower prices than other distributors, and offered service "anytime, day or night."[6] (Tr. 221-23)

Spray-Rite was not a free rider and provided unequalled pre-sale, point-of-sale and post-sale promotion and service. Dr. Earl Hughes testified that Hughes Hybrids bought its herbicides from Spray-Rite because it was a pioneer and

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[6] Flynn added that "the farmer appreciated what Don Yapp was doing." (Tr. 222)

innovator, "knew the business" and provided "very good service." (Tr. 1233-35) Spray-Rite recommended Monsanto products to Hughes and "gave more time to Monsanto than he did to Geigy." (Tr. 1237-38) When Spray-Rite was no longer able to supply Hughes with Monsanto herbicides, Hughes was forced to buy from other distributors who provided little or no service. (Tr. 1240-41, 1248, 1277)

Robert Tracy, Chairman of Tracy & Sons, testified that his company depended entirely on Spray-Rite for herbicide recommendations, that he never had a supplier who provided better service than Spray-Rite, and that Spray-Rite recommended that he use Monsanto's Ramrod instead of Geigy's Atrazine. (Tr. 898, 904-07, 910) Tracy wrote Monsanto a letter protesting Spray-Rite's termination and declaring that "Don Yapp . . . has done more than any other five persons in this general area to increase the use of herbicides and to help people get them properly applied." (PX 237; Tr. 908-09, 927) Tracy bought from other distributors when Spray-Rite could not supply them, but "we never got the help in the field that we had from Mr. Yapp." (Tr. 912, 920-21)

Robert Muirhead of Muirhead Farms testified that Spray-Rite sold 15 percent cheaper than other distributors, provided better service and "knew more about the chemicals." (Tr. 3200) Muirhead bought all of its herbicides from Spray-Rite because of its "[p]rice and service." (*Id.*)

James Forster, production manager of the DeKalb Agricultural Association[7] through 1967, testified that DeKalb bought its herbicides from Don Yapp "[b]ecause of the service and because of his knowledge of the chemicals and his willingness to work with us. . . ." (Tr. 2126-27) Regarding Monsanto's products, Spray-Rite "recommended them and we purchased large quantities of them." Yapp "worked 24 hours a day, 7 days a week." (Tr. 2127)

[7] During this period, DeKalb was the largest seed company in the world and the largest purchaser of herbicides in the United States. (Tr. 1175, 2117)

John Case, owner of PAG of Naperville, testified that his company bought all of its herbicides from Spray-Rite because it "was able to provide . . . product at a reasonable price, give us excellent service in season [and] provide us with the technical information to make sure our growers got the best results from the product. . . ." (Tr. 1710) Spray-Rite promoted and recommended Monsanto products, and as far as Case was concerned, Spray-Rite "was Monsanto in northern Illinois." (Tr. 1710, 1714) In 1969, PAG was forced to stop buying from Spray-Rite, since it "did not have a full line of chemicals to offer at that time." (Tr. 1716) It therefore bought from Monsanto distributors W. R. Grace and Hopkins, but "never had service from any chemical company like we had from Spray-Rite." (Tr. 1717)

As a result of its efficient, low overhead operation, Spray-Rite could sell at lower prices than other distributors and still make a substantial profit. (Tr. 221-22) In 1967 and 1968, Spray-Rite had net profits of $88,564 and $84,657, and by 1968 Spray-Rite had grown to be Monsanto's tenth largest distributor out of more than 100, and the eighth most proficient in meeting Monsanto's performance goals. (PX 126-27, 426; Tr. 1549-50) Spray-Rite's sales from 1963 to 1968 grew faster than the industry, and from 1957 to 1968 its sales multiplied more than 40 times. (PX 436; Tr. 2646-48) Monsanto's accountant testified that the sale of its products accounted for 47 percent of Spray-Rite's profit from 1966 to 1968. (DX 454; Tr. 3086-87, 3132-35)

E. The Conspiracy to Terminate Price-Cutter Spray-Rite Included Complaints, Demands for Action, Investigations, Warnings and Threats of Termination.

Spray-Rite was known by its customers, competitors and Monsanto as a distributor who never adhered to Monsanto's suggested resale prices.[8] (Tr. 126-27, 133-34, 614, 1375-76, 1379, 1392, 1937, 3319-20, 3572-73, 3630-31, 3662, 3779-80)

[8] In 1968, the year of its termination, all of Spray-Rite's sales of Monsanto herbicides were below Monsanto's suggested prices. (Tr. 3178)

Hopkins, who described Spray-Rite as a major competitor, testified that Spray-Rite set the level of competition on pricing in northern Illinois and southern Wisconsin. (Tr. 1375, 1379)

Monsanto personnel were also more than familiar with Spray-Rite's repatation and low prices. (Tr. 126-27, 133-34, 1937, 3319-20, 3630-31, 3662) Several described Spray-Rite as an "aggressive price cutter," and Flynn named seven distributors who called Spray-Rite a price-cutter and complained to him about Spray-Rite selling at an "exceptionally . . . low market price." (Tr. 126-27, 1937, 3319-20, 3662)

The complaints to Monsanto about Spray-Rite's prices were legion. (Tr. 107-29, 191-94, 1389, 1944-48, 3630-31, 3657-59) David Stein, a Monsanto financial services manager, testified that Spray-Rite's price-cutting was discussed at two Chicago district meetings during the 1968 season. (Tr. 2384-88) Stein stated that complaints about Spray-Rite's pricing came from virtually everyone in the distribution system, and that his superiors (Fischer, Bone[9] and Sinclair) and "other distributors" complained about Spray-Rite "not holding adequate price margins." (Tr. 2394-97)

Emmett McCormick, manager of a competing Monsanto-owned retail outlet (MAC Center) from 1964-67, testified that he had approximately twenty-five discussions with his area supervisor, James Sovacool, regarding Spray-Rite's price-cutting. (Tr. 1945-48) Spray-Rite was selling "every place" at low prices, and Sovacool repeatedly complained about "the same problem with Don Yapp" and "about this pricing situation." (Tr. 1947-48) Sovacool finally exclaimed: "[I]f we could keep these two guys [Yapp and John Mulvehill] squared away, we could stabilize things around here." (Tr. 1945-46)

Flynn testified that he received complaints about Spray-Rite's pricing "at least 20 times" from distributors

[9] Fischer testified that he made the final decision to terminate Spray-Rite based upon field information from Bone. (Tr. 3825-26)

American Oil, Farm Services, Funk Bros., C. D. Ford & Sons, Hub Oil, Cole Chemical, Bureau Service Company, Hopkins and FMC. (Tr. 107-29) Flynn stated that Monsanto was concerned about the prices their distributors were charging for Monsanto herbicides, and that St. Louis "wanted to know what the pricing was in the area." (Tr. 115-16)

Flynn testified that Spray-Rite published its prices in flyers distributed to dealers[10] and farmers, and that he "sent one of them to St. Louis as, you know, what Spray-Rite was doing." (Tr. 117, 119) Spray-Rite was also the subject of at least 25 written call reports sent by Flynn to St. Louis, and in "at least half" Flynn discussed specific complaints by named distributors regarding Spray-Rite's prices. (Tr. 120-21)

Flynn testified that on "three or four" occasions he approached Don Yapp regarding Spray-Rite's prices and "encourage[d] him to maintain or to derive the profitability out of the product that was suggested to him. . . ." (Tr. 114) Flynn recalled one instance where distributor Farm Services (F.S.), a "highly valued customer of Monsanto in the herbicide field,"[11] complained to him "face-to-face" about Spray-Rite "selling at what F.S. felt to be a low market price in its retail area." (Tr. 109-10) Flynn then approached Spray-Rite: "I would tell Don, you know, that we received this complaint . . . and tried to encourage Don

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[10] Flynn added: "[A] dealer would get ahold of one of these [Spray-Rite] flyers . . . and when I would show up on the scene on a sales call, the dealer would pull the flyer out and say, 'Well, what do you think of this?' " (Tr. 117)

[11] Flynn added that "if F.S. complained, generally if it was a very vocal specific complaint, it was relayed to St. Louis by means of a call report." (Tr. 108) F.S. was an influential "major" or "national" Monsanto distributor due to "the depth that they had . . . in the corn belt area, and their strength as far as marketing products." (Tr. 126, 135)

to realize the profitability aspect in the sale of the product." (*Id.*)

In yet another instance, distributor Hopkins complained about Spray-Rite's low prices to Bob Wilson, a Monsanto sales representative in Wisconsin. (Tr. 127-28, 193-94) Hopkins was attempting to sell a dealer in southern Wisconsin, and he complained to Wilson that "he could not compete with Don Yapp's marketing practices." (*Id.*) Wilson relayed the complaint to Flynn and told Flynn to keep Spray-Rite out of Wisconsin. (*Id.*) Flynn in turn confronted Spray-Rite with the complaint, but Yapp refused to tell Flynn whether Spray-Rite would heed Monsanto's warning. (Tr. 194)

On May 16, 1967, Hopkins wrote a letter to Peter Arvan, Monsanto's general manager for agricultural chemicals, complaining about an attached price flyer offering Monsanto herbicides to a customer at prices which he viewed as "unloading excess inventories." (PX 185; Tr. 1395) Hopkins stated that such "actions as represented by the attached flyer are definitely not conducive to an *orderly marketing structure*," and that he wanted Arvan's response regarding this "situation . . . of interest to you." (*Id.*) (Emphasis added) Hopkins admitted that he was not able to compete with this distributor's prices,[12] and that his goal in sending the letter was to cooperate with Monsanto in prohibiting sales at depressed prices. (Tr. 1399-400) Hopkins also ad-

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[12] Hopkins testified that he was concerned until after the 1968 season about his company's ability to meet Spray-Rite's prices. (Tr. 1379) Hopkins "expected a 25 percent return on investment capital," and he flatly admitted that he could not compete with Spray-Rite's low overhead operation:

> [T]hey [Spray-Rite] were able to stay in business for years, from '65 to whenever they pulled out of the market at the low profit margins. We were barely making any money through those years and it was necessary for us to sell at higher prices in order to stay in business.

Tr. 1383-86.

mitted that he received Spray-Rite price flyers from both his salesmen and dealers through 1968, and that he complained to Monsanto about Spray-Rite's prices. (Tr. 1378, 1383-84, 1388-89, 1397-98)

Flynn also testified regarding complaints he received about Spray-Rite's pricing from Garland Grace, field wholesale salesman for Monsanto distributor FMC. (Tr. 128-29, 191-93) Grace showed Flynn Spray-Rite flyers and complained "25, 30 times" that he was "coming against some very stiff price competition from Spray-Rite." (Tr. 129, 192) Flynn transmitted Grace's complaint to either Bill Butler, Chicago district manager, or to his product supervisors in St. Louis. (Tr. 192-93)

Flynn recalled a specific instance where Grace showed him Spray-Rite price flyers and stated that "he could not meet [Spray-Rite's] competition in terms of prices." (Tr. 129) Grace complained that "Spray-Rite's practices were having an effect upon his ability to sell Monsanto products," and wanted to know if Flynn "*could do anything about it.*" (*Id.*) (Emphasis added)

In response to these distributor complaints and requests for action, Monsanto moved from Flynn's "suggestions" to clear threats of termination. (Tr. 616-711) In June or July of 1966, Bill Butler, Monsanto's district manager for Spray-Rite's trade area, telephoned Yapp and asked him to attend a meeting at the district office. (Tr. 615) Yapp met with Butler and Arvan, who questioned him regarding the prices Spray-Rite had quoted for Monsanto's Ramrod to Myer's Inc. at Lexington, Illinois, and other customers.[13] Yapp testified:

> Mr. Arvan told me that we had better increase our prices, if we do not increase our prices we may lose our distributorship.

Tr. 619.

[13] This meeting occurred during the period that Flynn was reporting distributor complaints and demands for action to both Butler and Arvan.

In January of 1967, Spray-Rite received a telephone call from Donald Fischer,[14] Monsanto's product sales director in St. Louis. (Tr. 620-27, 1122-24) Fischer told Yapp that Arvan[15] had requested him to telephone regarding the prices Spray-Rite had charged for Randox to Myer's Inc. and to Stewart Hybrids at Princeville, Illinois. (Tr. 625, 1124) Fischer asked whether Spray-Rite "had charged $41.05 for Randox," and Yapp responded that the price was $41.87.

In February of 1968,[16] William Bone, Butler's successor as manager of the Chicago district, telephoned Spray-Rite and asked Yapp whether he was "aware of the Monsanto suggested price on Ramrod." (Tr. 702, 1125) Bone then asked Yapp what price Spray-Rite had charged Myer's Inc. for Ramrod 20-G. (Tr. 702) Bone told Yapp that Spray-Rite was to sell at Monsanto's suggested prices, and that if Yapp did not know these suggested prices, he would

[14] The first thing that Fischer told Yapp at the 1968 meeting regarding Spray-Rite's termination was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 768, 774, 1295)

[15] Hopkins testified that during 1967 he met with Arvan in the Chicago district office to discuss Monsanto's pricing policies and "possibly" Spray-Rite. (Tr. 1401-03)

[16] Monsanto repeatedly claims, without supporting citation, that the last distributor complaint occurred 15 months prior to Spray-Rite's non-renewal. (Pet.Br. at 10, 11, 12, 39) Given the plethora of complaints both before and *after* termination, the jury could easily have inferred that this 1968 telephone call from Bone about Myer's Inc. was the result of one or more distributor complaints—as were the prior calls in 1966 and 1967 regarding Myers. Moreover, Hopkins testified that he complained to Monsanto about Spray-Rite's prices, and that he continued to receive Spray-Rite flyers and to be concerned about Spray-Rite's prices through 1968. (Tr. 1379, 1383-84, 1388-89) In addition, Monsanto's Stein testified that Spray-Rite's price-cutting was discussed at two meetings of the Chicago district during the 1968 season, and that he heard complaints about Spray-Rite's pricing from virtually everyone in the distribution system, including "other distributors." (Tr. 2384-88; 2394-97)

send Spray-Rite a price list. (Tr. 703) Bone did send Spray-Rite a price list with the words "Dealer Price" underscored by hand and a note that the list was from him. (PX 202, J.A. 62-63; Tr. 704, 708, 713) Bone also told Yapp that if Spray-Rite did not follow Monsanto's suggested prices, *"retaliation was going to take place."* (Tr. 711) (Emphasis added) Spray-Rite refused to follow those suggested prices. (Tr. 712)

F. Spray-Rite Was Terminated for Price-Cutting; Monsanto's Business Explanation Was Specious.

On October 28, 1968, Fischer telephoned Spray-Rite and informed Yapp that Monsanto did not renew Spray-Rite's distributorship contract for the 1969 season. (Tr. 767) When Yapp went to St. Louis on November 8 to plead for reconsideration, the first thing Fischer told him was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 774, 1295)

Fischer testified that he personally made the decision not to renew Spray-Rite. (Tr. 3824, 3826) Fischer did not recall whether he ever told Yapp the reason for Spray-Rite's termination, but the *sole* reason for his decision was that Spray-Rite "didn't have a sales organization." (Tr. 3850, 3914) Fischer admitted that he had no personal knowledge about Spray-Rite when he made this decision, and that he relied on district manager Bone for whatever information he had. (Tr. 3868, 3912)

Bone, however, testified that he did not discuss any Monsanto criteria with Spray-Rite, and that he never suggested that Spray-Rite hire more salesmen.[17] (Tr. 2522) Bone had no information that Spray-Rite was not properly servicing its customers, and he did not recall stating to anyone at Monsanto that Spray-Rite did not have a sales organization or failed to meet any of Monsanto's criteria.

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[17] Not one Monsanto witness testified that he discussed Monsanto's criteria with Spray-Rite prior to its termination, or that Spray-Rite refused to hire more salesmen or meet any criteria.

(Tr. 2521, 2525, 2530) In fact, Bone did not recall either making or even being asked to make a recommendation during 1968 regarding Spray-Rite's non-renewal. (Tr. 2528-29)

Yapp testified that Spray-Rite met all of Monsanto's criteria, and that he had no reason to believe that Spray-Rite would not be renewed for the 1969 season. (Tr. 697, 1281, 1335) During the 1968 season, no one from Monsanto told Spray-Rite that it did not have a sales organization or failed to meet any of its criteria, and the only complaint Spray-Rite ever received from Monsanto concerned its pricing. (Tr. 614-15, 619-20, 1294)

Spray-Rite's termination was also against Monsanto's immediate economic interest. By 1968, Spray-Rite had grown to be Monsanto's tenth largest distributor out of more than 100, and the eighth most proficient in meeting Monsanto's performance goals. (Tr. 1549-50; PX 426) Tom Dille, Monsanto district manager, wrote after the 1969 season that "my greatest need is in northern Illinois where we missed some sales this year . . . ." (PX 279, J.A. 71) At the end of the 1967 season, while Spray-Rite was still a distributor, Illinois was the only state in which Monsanto's distribution was characterized as "Excellent." (PX 209)

G. Monsanto's Business Explanation for Spray-Rite's Termination Is Inconsistent with the Post-Termination Boycott.

Termination did not stop the complaints from Monsanto distributors about Spray-Rite's pricing. A 1970 letter to Monsanto regional sales director Robert Schweikher from USS Agri-Chemicals contrasted its prices with the prices on an attached Spray-Rite flyer. (PX 307, Tr. 1806-07, 3504) A 1971 letter from distributor Smith-Douglas to Schweikher enclosed a Spray-Rite price flyer and commented that "[e]vidently the Spray-Rite Service Corporation—judging from the attached—doesn't have too much sympathy for companies such as yours and ours. . . ." (PX 376 at 3; Tr.

3526-28, 3576-77) Schweikher replied, stating that "[n]eedless to say, the [Spray-Rite] flyer had been brought to our attention by many of our customers in the Midwest," and that "Spray-Rite . . . has not been an appointed distributor for Monsanto . . . in the years 1969, 1970, 1971. . . ." (PX 376 at 1; Tr. 3526-34) A 1972 letter from Midland Cooperatives to Monsanto district manager Albertson also enclosed a Spray-Rite price flyer and concluded:

> [A]ny effort on the part of your company to see that this type of marketing activity is discontinued will certainly be most appreciated and will be a benefit to the entire industry.

PX 384; Tr. 2252-54, 2272.

Tom Dille, Monsanto district manager for Spray-Rite's trade area from 1968 until the end of 1971, testified that both he and his six sales representatives continuously received complaints about Spray-Rite's prices from Monsanto distributors in the district. (Tr. 1736) Whenever a salesman received a complaint, he reported it to Dille, who in turn relayed it to his supervisors in St. Louis. (Tr. 1736-37) Dille also testified that "many" Monsanto distributors asked him and his salesmen "what will you do about them [Spray-Rite]," and that he transmitted these inquiries to St. Louis. (Tr. 1741-42) He declared that "more than one" Monsanto distributor, particularly in northern Illinois, asked whether Monsanto could cut off Spray-Rite's source of Monsanto products. (Tr. 1742-43) Such specific requests "would have gone to Bob Schweikher" in St. Louis. (Tr. 1742-44)

In the light of such continuing complaints and calls for action, Monsanto and its distributors were not satisfied with just terminating Spray-Rite's ability to purchase directly from Monsanto—they joined together to ensure that Spray-Rite was unable to buy Monsanto herbicides from anyone in the distribution chain. (Tr. 155, 168-71, 224, 1733-34, 1948-51, 1954-56, 2406)

Flynn, re-employed by Monsanto as a sales representative in western Illinois during 1968-70, testified that he was aware that during this period Spray-Rite had difficulty purchasing Monsanto herbicides. (Tr. 92, 136, 168-69) Spray-Rite was "still selling products at low prices," and "[t]here was a fear that if Don [Yapp] could get hold of any product, that he could . . . create an irritation to Monsanto's distributor program." (Tr. 155, 224) Flynn stated that "[i]n either the 1969 or the 1970 season, Monsanto became aware that Don Yapp did have some Monsanto product . . .," and that district manager Tom Dille asked Flynn to discover the source of Spray-Rite's supply. (Tr. 169) Flynn then called on some dealers and distributors "in an indirect method . . . to determine where Don got this product." (*Id.*) He added that since "there was a grapevine among the distributors" and "the distributors as a general rule did communicate among themselves," he could "put together an answer to a question that may have been presented . . . by Tom Dille or other Monsanto personnel." (Tr. 169-70) Flynn testified that during this period Dille told Monsanto sales representatives at district sales meetings that both he and Monsanto "did not want Don Yapp to get any product." (Tr. 170-71)

Emmett McCormick, Monsanto's district manager in Minnesota during 1968-69, testified that Spray-Rite was frequently described "[a]s a price cutter and hard to control" by various Monsanto officials during district manager meetings held in St. Louis during this period. (Tr. 1948, 1954-55) When McCormick proposed that Mid-State Chemical (John Mulvehill) be added as a new Monsanto distributor for the 1970 season, an objector declared: "Let's not have another Don Yapp." (Tr. 1948)

McCormick testified that during this period "we were trying to find out what he [Yapp] got his products for, what price and who sold it to him." (Tr. 1949, 1956) More specifically, "Bob Schweikher . . . asked Associated Producers [Fred Bailey] several times if they sold Don Yapp."

(Tr. 1949) McCormick added that he was also "asked to control it," and that "[t]he only one I knew I had problems with was Associated Producers . . . ." (Tr. 1951, 1955) McCormick therefore "told Fred Bailey that he wasn't supposed to sell Don Yapp," and his command was obeyed. (Tr. 1951) When asked the purpose of all this effort, McCormick declared: "Well, to keep Don Yapp from tearing up the marketing." (Tr. 1950)

Monsanto also told John Mulvehill, president of distributor Mid-State, not to sell Spray-Rite. (Tr. 274-75) In March of 1970, Mulvehill met with Stewart Daniels, Assistant General Manager of the Agricultural Division:[18]

> Mr. Stew Daniels . . . told me that I shall not sell Spray-Rite in Illinois . . . . I said, "What's going to happen if I do?" He said, "You know what's going to happen." "You mean I may not be selling next year?" He said, "You get the idea."

Id.

In the fall of 1970, less than one year after his conversation with Daniels, Spray-Rite called Mulvehill to buy Monsanto herbicides. (Tr. 289-90, 858-62) Mulvehill testified that the Spray-Rite call "tied back to the statement that Daniels had made to me," and that he "immediately got sort of a little sick feeling in my stomach because I knew I couldn't sell him or didn't think I was going to be able to do it and get away with it." (Tr. 290-92) Although Spray-Rite's order was "a big sale, cash in hand," Mulvehill stalled until he could meet with Max Albertson, Monsanto's district manager for Minnesota:

> And either the Friday or the Thursday before the closing date of that order, Max was in fact in my office and I did ask him if I could make that sale to Don Yapp. I said, "I have it in hand here. He's called. He's done everything possible to buy this stuff from me," and he said, "No, don't make that sale. He's somebody that

[18] Daniels was second in command of the entire Agricultural Division. (Tr 3289)

> we don't want you to sell to. And besides, he's out of your territory."

Tr. 292. Mulvehill therefore declined the sale, even though Yapp "was pretty desperate and . . . even raised the price." (Tr. 293-94) Mulvehill added that he was trying to "play their game," and that "[i]f I had not had the fear of getting in trouble with Monsanto, I would have done it." (Tr. 295, 297)

The effects of the termination and concerted refusal to deal were obvious and devastating. (*See, e.g.*, Tr. 2682-87) During 1969, Spray-Rite could not purchase even one gallon of Monsanto's new and improved Lasso (Tr. 793, 809, 2988), which Monsanto agreed was the real reason for Monsanto's increased sales during that year. (*See* pp. 6-7 *supra*) What little Monsanto product Spray-Rite was able to obtain, was too little, too late[19] and at non-competitive prices. (Tr. 811-71, 2682-87) Without a full line,[20] Spray-Rite's sales dropped 70% between 1968 and 1972. (Tr. 2955) Spray-Rite plunged from profits of $88,564 and $84,657 in 1967 and 1968 to losses of $37,067, $111,513, $61,763 and $65,469 in 1969, 1970, 1971 and 1972, respectively. (*Compare* PX 126-27 *with* PX 128-31; Tr. 716-17) To quote Monsanto's Sovacool, Spray-Rite had been "squared away." (*See* pp. 3, 10 *supra*)

H. Monsanto's Customer and Territorial Policies and Programs Had the Purpose and Effect of Stabilizing Prices and Prohibiting Sales to Spray-Rite.

Between Spray-Rite's termination (1968) and its eventual destruction (1972), Monsanto enacted and/or enforced cer-

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[19] Spray-Rite's early season sales, traditionally two-thirds of its annual total, plummeted from more than $2 million in 1968 to $1,500 in 1969. (Tr. 567-69, 808-09)

[20] Not only Yapp, but Spray-Rite's competitors and even Monsanto officials testified to the critical importance and competitive necessity of having a "full line." (Tr. 97, 168, 630-31, 682, 1435-36, 2537-38, 2682, 3207, 3597; PX 146, Tr. 1504, 1631; PX 279, J.A. 71, Tr. 1768-69, 1774)

tain customer and territorial policies and programs that had the purpose and effect of stabilizing prices and discouraging or even prohibiting sales to price-cutter Spray-Rite.[21] (*See, e.g.*, Tr. 2667-80, 2688-93, 2716-25) Monsanto's distributors cooperated with or acquiesced in this conspiracy in order to reap substantial financial benefits and continue as distributors. (*See, e.g.*, Tr. 289-95, 846, 1432, 2673-76)

Allan Davis, Monsanto's manager for marketing administration, testified regarding all of the programs and policies for each of the four years. (Tr. 1566-67, 1574-640, 3034; PX 136-38, 139, 141, 143, 145-46) Dr. Ozanne, Spray-Rite's marketing and damage expert, then testified regarding both the anti-competitive effects and the specific impact upon Spray-Rite of the four programs and policies at issue—areas of pricing responsibility, shipping and pick-up, compensation for sales to resellers, and early order payments. (Tr. 2667-80, 2688-93, 2716-25)

During this period, Monsanto conducted annual distributor presentations for each of its distributors and explained the primary purpose of its programs and policies as being "to maintain, and increase, profit margins in distribution channels. . . ." (PX 144 at 15; Tr. 1654-58) David Stein, St. Louis district manager for Monsanto during 1968-70, admitted that the relationship between resale price maintenance and Monsanto's programs and policies was discussed at 40 to 50 percent of its distributor presentations:

> There were times after the program presentation or during the program presentation that there were points made about control of territories, distribution systems, price levels, purchases of other products. These types of comments were made to selected distributors in an effort for Monsanto . . . to keep the price levels and profit levels as attractive as possible during the entire marketing system so that . . . there were at times direct

[21] The evidence in this section provides the causal connection or "linkage" of these policies and programs to the price-fixing conspiracy and supports the jury's answer to Monsanto's Special Interrogatory No. 2.

> statements, there were at times innuendoes to a particular distributor as related to particular potential problem areas within that distributor.

Tr. 2371-72. Monsanto, for example, told Mid-State Chemical during a distributor presentation that if it did not hold its prices, or if it sold outside its area or to certain customers, it would be terminated. (Tr. 299-300) Monsanto's Schweikher delivered these threats in "[v]ery few words, very curt, sharp, clear and distinct." (Tr. 302)

Beginning with the 1969 season, Monsanto prohibited its distributors from shipping or picking up Monsanto herbicides from warehouses outside previously established areas of primary responsibility.[22] (PX 137, J.A. 48, Tr. 1558-59, 1567, 2247, 2269) As enforced and "policed"[23] by Monsanto, areas of primary responsibility were clear cut. (Tr. 327, 1939, 2353) Distributor Mulvehill testified:

> Yes, there were occasions where I asked if I could make a separate sale outside of this territory and was told, flatly, "No. Don't even bring it up. You know where you belong."

Tr. 327. District manager Stein testified that Monsanto told distributors in "eye-to-eye discussions" not to sell outside their areas of primary responsibility. (Tr. 2354, 2357)

The relationship between resale price maintenance and areas of primary responsibility was even more explicit, as evidenced by McCormick's description of Monsanto's 1969 district manager meetings:

> We [Monsanto] were trying to stabilize this . . . . We felt . . . that if we could limit distributors in a certain area that we could limit the competition, and, in turn, limit the price gouging and cutting . . . . That was the reason behind . . . giving a distributor only two or three states to limit this competition amongst the distrib-

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[22] Dr. Ozanne testified that Monsanto's areas of primary responsibility and shipping policy were "two very closely related elements" of the conspiracy. (Tr. 2688)

[23] Mulvehill added: "Price policing events convinced me that they meant business." (Tr. 326)

> utors and, in turn, limit the price cutting, because if you had twenty-five independent distributors in Minnesota after a given amount of product, someone would have to cut a price to get it, and if we could keep our distributors out of a state, this would *stabilize the market.*[24]

Tr. 1936-38 (Emphasis added). Stein testified that in considering a distributor for renewal, whether he stayed within his area of primary responsibility was "a consideration that Monsanto was concerned about in an effort to provide price stability . . . ." (Tr. 2353-54, 2356)

A typical example of an "eye-to-eye" discussion is Mulvehill's description of Schweikher's "advice" to Mid-State during its 1969 distributor presentation:

> And, really, John, it's all quite good for you. If you maintain the prices, and we don't get into a big price war out there with each other . . . , you are going to be happy and we're going to be happy. Now the way that is done [is] by giving people certain pieces of geography to work in and stay in. Now you play our ball game and we're going to get along just fine.

Tr. 320. McCormick, who attended this presentation for Monsanto, testified that he and Schweikher told Mulvehill:

> We are trying to get a stable market, and *the reason why we are limiting you to certain states is so we could stabilize the market.*[25]

Tr. 1983-84 (Emphasis added). Schweikher also instructed Mulvehill regarding Monsanto's policy on shipping to price cutters:

> And he [Schweikher] made a point about pricing, wherein he stated that, no, they weren't going to be

[24] McCormick noted that "at every district managers' meeting we talked about prices, how we could stabilize it," and that the participants would "spend 45 to 50 percent of our time talking about these areas of responsibility . . . and on pricing." (Tr. 1938)

[25] McCormick stated that he and Schweikher specifically used the words "stabilize the market," that the "only way we can do that is to . . . give them certain areas to sell in," and that Monsanto would give a distributor "a fairly small area so he doesn't want too much . . . [and] wouldn't tear the market up." (Tr. 1984)

> looking in on every sale, but they had enough people in the field to get the general terms of the pricing and that if the situation arose where they felt I was too low, might just be that I wouldn't get a shipment . . . .

Tr. 320-21.

Monsanto was constantly attempting to "control" Mid-State's pricing and limit its sales area. (Tr. 292, 344-45, 352-53) Sinclair, Dille and Blackwelder first expressed concern at the 1969 district managers' meeting appointing Mid-State as a Monsanto distributor and setting its area of primary responsibility:

> Everyone felt that we [Monsanto] gave John Mulvehill too many states, that we couldn't control him and his pricing, and he would be moving products all over. And further, that he would compete with other distributors that were strong in that area and that he would bring down the price.

Tr. 1916. In the fall of 1971, Monsanto told Mid-State to keep its low prices out of South Dakota:

> You [Mulvehill] just be careful what you do, how you play our ball game . . . . You keep your prices up; you stay in your territory and we'll get along just fine.

Tr. 344-45. During the 1972 season, Monsanto again told Mid-State to get its prices up and "play the ballgame" or it "might not be a distributor next year." (Tr. 352-53)

Monsanto was also concerned that Mid-State would sell terminated price-cutter Spray-Rite at a price which would permit Spray-Rite to "tear up the market." (Tr. 1950, 1984) Daniels therefore warned Mulvehill in March of 1970 that Mid-State "shall not sell Spray-Rite in Illinois" or risk termination. (Tr. 274-75) That fall Mid-State acquiesced by following the order of Monsanto's Albertson:

> No, don't make that sale. He's somebody that we don't want you to sell to. And besides, he's out of your territory.

Tr. 292.

Two weeks later, Spray-Rite attempted to purchase Monsanto herbicides from distributor Midwest Agricultural Warehouse Company. (Tr. 845-46) Spray-Rite was located

outside Midwest's area of primary responsibility, and Phil James, Midwest's general manager, told Yapp that district manager "Lane had contacted him [James] and told him that he could not sell any Monsanto products outside of his assigned area *or else*." (Tr. 846) (Emphasis added)

Beginning in 1969, Monsanto also instituted compensation programs which paid its distributors for sales to "resellers" or "dealers." (PX 136-39; 141, 143, 145-46; Tr. 1557-658, 3034) A reseller or dealer was defined as one selling primarily to the consuming farmer, and "credit would only be given to distributor sales that went to resellers that fit this definition." (Tr. 142) The amount of compensation for such reseller or dealer sales increased substantially between 1969 and 1972, and as the programs developed Monsanto required more detail from cooperating distributors regarding when, where and to whom its products were sold. (PX 146 at 6, Tr. 1631; DX 288; Tr. 1431, 3796, 3799, 3802-03)

During this period Spray-Rite was classified by Monsanto as a "sub-distributor" or "a wholesaler who does not have a contract," and a distributor who sold Spray-Rite was not compensated under its programs. (Tr. 2201-02, 2455) Dr. Ozanne testified that Monsanto's payment of compensation only for sales to resellers was "a very significant factor" in discouraging sales to non-reseller Spray-Rite. (Tr. 2674, 2725) Monsanto's compensation programs also "produced a situation where Spray-Rite, when it could obtain product, would pay a higher price than it would have if it had been a contract distributor." (Tr. 2692; *accord* Tr. 3615) When Spray-Rite attempted to purchase Monsanto herbicides from distributor Midwest in December of 1970, James quoted a price he knew Spray-Rite would not and could not accept. (Tr. 3688-89) James also knew that Spray-Rite was a very aggressive price-cutter, that the price he quoted Spray-Rite was higher than the price he had sold other sub-distributors, and that less than one month before he had met with Monsanto and been told that Midwest

had "a choice to make" regarding its sales to "others." (PX 320, Tr. 3688-91, 3710)

The final blow to sub-distributor Spray-Rite came in the 1972 season when Monsanto changed the time for payment of its early order discount. (Tr. 2716-24) Before 1972, a Monsanto distributor who ordered early received a substantial discount off the face of the invoice. (Tr. 1625-27, 2718) In 1972, Monsanto changed this policy so that the early order discount was not paid until the end of the selling season. (DX 38, J.A. 90; Tr. 1627-28, 2718) According to Monsanto, the old practice was undesirable, since the preseason discount was not retained by some distributors, created "depressed pricing practices" by distributors, left product movement "strictly in [the] hands of distributors," and "[e]nabled sub-distributors to operate at distributor or *slightly below distributor price well into season.*" (PX 146 at 3, Tr. 1631) (Emphasis added) The delay in payment resolved these problems with distributor margins and price-cutting sub-distributors, because the "[d]istributor will not receive compensation until October which should encourage retention of monies for more dollars of margin . . . [and] service of bona-fide resellers rather than sub-distributors and others." (PX 146 at 4)

I. Monsanto and Its Distributors Engaged in a Pervasive Pattern of Resale Price Stabilization, Including Monitoring, Policing, and Threats of Termination, Resulting in Distributor Agreement and Acquiescence.[26]

Between Spray-Rite's termination and its total destruction, Monsanto wasted no time in "getting our distribution system in line." (Fischer, Tr. 3847) During the summer of 1969, for example, Monsanto held several district manager meetings in St. Louis during which Schweikher dictated

[26] This section is directed at Monsanto's blatantly false assertions that there is no evidence in the record (1) "that distributor resale prices were controlled"; (2) "that distributors adhered to suggested resale prices"; or (3) "that distributors acquiesced in any price coercion by Monsanto." (Pet. Br. at 12, 44)

Monsanto's "pricing policy on Lasso"—"how we could stabilize it." (Tr. 1910-12, 1938, 1944) McCormick best described that policy:

> We had several meetings in St. Louis in 1969. In these meetings we were appointing new distributors, we were dismissing other ones, and at these meetings we spent a considerable amount of time talking about how we could stabilize the price in the market place .... [A]t that time it was Lasso liquid which we were trying to control; it was a new product which was short; there was a big demand for it, and we felt that we should be able to hold the price on that product because, in the future, we felt that it was going to be a big mover for Monsanto down the road, and if we could stabilize the price at the market place, then we would have more dealers handle our products. ... If the distributor cut the price, then, some dealer would have an edge on the the next dealer; so, then ... our pricing structure would go to pieces.[27]

Tr. 1929, 1935.

Other examples of Monsanto and its distributors stabilizing resale prices during 1969-72 include:

1. Monitoring the market. As a part of Monsanto's 1969 goal of "preventing any undue price wars," St. Louis district manager Stein was directed by "management ... to monitor and observe the market" (Tr. 2301, 2380):

> We were asked to monitor the level of pricing in the market place in a given season. And in the case of reports of someone selling at low prices, we were asked to investigate and try to determine whether or not the allegations were in fact true. And then we reported back to our superiors as to whether or not ... there was, oh, *any undue competition* in any areas. ...

Tr. 2301 (Emphasis added). The persons so requesting included management in St. Louis, other district managers, and "a distributor or dealer of our product line." (Tr. 2312, 2314, 2380-81) Upon receiving such a request, Stein would

[27] McCormick testified that during this period he talked to every distributor in Minnesota about Monsanto's plan to stabilize the price of Lasso. (Tr. 1935)

"inquire at that time as to a particular situation," including the price and seller. (Tr. 2312, 2380) He then confronted the seller:

> When we came across a situation like that . . ., I inquired of the distributor as to his reasons for pricing lower than perhaps I thought they should. . . .

Tr. 2313.

2. The decision of the umpire is final. Monsanto's approach to marketing and distributor selection for the 1969 season was described as follows by distributor Associated Producers in a newsletter issued the month of Spray-Rite's termination:

> Monsanto, now recognizing the absolute necessity of getting the "market place in order" with regard to their entire line of agricultural chemicals, is determined to do what it takes to rectify the situation from now on.
>
> * * *
>
> [E]very effort will be made to maintain a minimum market price level.
>
> In other words, we are assured that Monsanto's company-owned outlets will not retail at less than their suggested retail price to the trade as a whole. Furthermore, those of us on the distributor level are not likely to deviate downward on price to anyone as *the idea is implied that doing this possibly could discolor the outlook for continuity as one of the approved distributors during the future upcoming seasons.* So, none interested in the retention of this arrangement is likely to risk being deleted from this customer service opportunity. . . . It is elementary that harmony can only come from following the rules of the game and that in case of dispute, the decision of the umpire is final.

PX 233, J.A. 65-69, Tr. 2566-70 (Emphasis added). Bailey, president of Associated and author of the newsletter, testified that Monsanto "really wanted us to adhere to their suggested pricing schedule," and that he prepared the newsletter soon after meeting in person with Monsanto's Sovacool, McCormick and Albertson. (Tr. 2564-65, 2571-73)

3. Monsanto's additional oral criteria. Stein testified that in evaluating its distributors during the 1969 season, Mon-

santo utilized not only the written criteria in the distributor agreements, but also certain additional, oral criteria: (1) "how well they kept their margins, price margins;" (2) "whether or not a man was a price cutter;" (3) "whether or not he maintained a stable price schedule throughout the season;" and (4) whether or not he "played the game." (Tr. 2346-47, 2356, 2478-79)

4. Distributor American Oil acquiesces. District manager McCormick testified that early in 1969, MAC manager Ray Meyers gave him a copy of an invoice indicating a sale of Lasso to a farmer by distributor American Oil "at a reduced rate." (Tr. 1931-34) McCormick then confronted the American agent:

> All I told him was that Lasso was in short supply. We don't want people cutting price; we expect to get the highest price for this because there was such a demand, and if you can't get it, well, maybe we can shove it to somebody else.

Tr. 1933. McCormick also "turned this over to St. Louis" to regional sales director Schweikher, who told McCormick: "I'll take care of it." (Tr. 1933-34) Schweikher then called American Oil's main office in Kansas City, which in turn contacted its agent. (*Id.*) McCormick testified:

> An American Oil representative from Kansas City called the . . . [agent] and talked to him about this problem, and the . . . [agent] came back and told me, later, that it was all taken care of. He was going to settle for the suggested price, at whatever they were supposed to sell.

Tr. 1934.

5. Monsanto disciplines Associated Producers. McCormick testified that Schweikher telephoned him from St. Louis in March or April of 1969 regarding a sale "for too low a price" by distributor Associated Producers to Funk Seed:

> Bob Schweikher wanted me to call Associated Producers and tell them we were out of the product and that we couldn't ship any more right now.

Tr. 1929-30, 1934. McCormick and Schweikher confronted Fred Bailey, president of Associated:

> Well, we went in and tried to explain our programs to Fred, how we felt there was such a demand for our product, and that he ought to be able to make more money without selling it at a reduced price. And, we also told him at that time that he wasn't going to get all the Lasso he was supposed to get because we were out at that time.

Tr. 1930. McCormick testified that what they told Bailey about Lasso was not true. (Tr. 1931)

6. Terra acquiesces. District manager Dille testified that in 1971 "everybody kept addressing our people and myself about this distributor [Terra] in Wisconsin" who was selling fertilizer and Monsanto herbicides as a package at a low price. (Tr. 1883, 1888) The complaints resulted in a request that Dille "visit Bill Skree," and the outcome of that visit was described in a July 21 memorandum from Dille to Monsanto's Sinclair:

> I had an opportunity while in Madison this past week to visit with Bill Skree of Terra about my area of concern with this distributor. He told me that they had two types of farmer dealer arrangements. In Iowa they work as a commissioned agent, selling at a certain price and then receiving a certain commission. However, in Wisconsin they make the sale to a farmer at dealer prices along with fertilizers. He is then responsible for sales and collections from his customers. They have no discipline on the selling price of the fertilizer or herbicide.
>
> He agreed this was not a healthy situation and had caused him considerable grief in certain areas. They will continue with the farmer dealer marketing philosophy next year, but will place the Wisconsin dealers on a commission rather than direct sale basis.

PX 355; Tr. 1881-85. Dille testified that the complaints about Terra were from "other distributors," and that Terra's agreement to stop this package discounting made his "life . . . much more pleasant." (Tr. 1887-89)

SUMMARY OF ARGUMENT

Monsanto should not have agreed to submit *per se* instructions and then after an adverse jury verdict, argue to the higher courts that the jury was not properly advised of the law. The fundamental unfairness in that position was further highlighted when Monsanto, after trial, did not ask the trial court to enter judgment notwithstanding the verdict on the ground that the jury was improperly instructed.

This case begins and ends with a dramatic change in what Monsanto preceives the law to be; that dramatic change did not surface until the jury decided against Monsanto on the *per se* instruction accepted by Monsanto. It is unfortunate indeed, that the Court is asked by Monsanto and the antitrust division to address a "fundamental" change in the law, using a case in which the District Court never received from Monsanto the "rule of reason" instructions, now said to be so important to antitrust enforcement. The Court should not accept Monsanto's new, post-trial assertion that the case was improperly submitted using *per se* instructions.

Spray-Rite was driven from the industry after a successful business history in which Monsanto recognized Spray-Rite as its tenth largest distributor out of a total system of 100 distributors. The record shows persistent reaction by Monsanto to distributor complaints and requests for action against Spray-Rite's price competition. Monsanto threatened retaliation, warned of termination, followed through on its warnings to terminate, and instigated a boycott of Spray-Rite as a direct result of Spray-Rite's failure to follow prices established by Monsanto. The evidence was overwhelming; the jury could reach no other conclusion. Monsanto's explanation for the event of termination was specious: Spray-Rite was told that it did not hire enough salesmen. No trier of fact would accept such a story. Spray-Rite had increased its sales in the years prior to termination

by 600%. It was against Monsanto's economic interest to terminate Spray-Rite, unless—as the jury believed—Monsanto was about to introduce its new and third generation product, Lasso, and needed to maximize profits by stabilizing the market and eliminating price-cutters.

The petition inaccurately states that this case involves a "fundamental issue" of whether a jury verdict can be based upon mere distributor complaints followed by an unrelated termination. Such a statement is a wholesale disregard of the record and the rule that inferences are to be used on appeal to support a jury verdict, not the arguments and rejected theories of the losing party.

This case should not be used by the Court to resolve an alleged conflict between the circuits on the amount of proof necessary to establish vertical price-fixing because the facts reviewed by the Seventh Circuit in this case support a violation of the Sherman Act under any expression of that theory in the various circuit courts. In short, this is not a case to measure such differences, if any, among the circuits because the jury would find a violation under any form of *per se* instruction.

ARGUMENT

I. Monsanto's Statement of this Case Omits the "Agreement" in the District Court to Apply a "Per Se" Test, Ignores Monsanto's Illegal "Boycott" of Spray-Rite, and Construes the Evidence in Favor of the Losing Party.

Monsanto's Statement of the Case is a partial, argumentative review of the record highlighting Monsanto's testimony which the jury rejected. It is not a concise statement of the facts within the rule that the evidence and reasonable inferences on review are to be construed in favor of the jury's decision. *See Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962); *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35 (1944).

First. The "rule of reason" test now advanced as so important to antitrust law was never presented

to the District Court: Monsanto agreed to per se jury instructions.

Monsanto's Statement of the Case states that fundamental issues "important to the antitrust laws" are presented in this matter, the first of which is the need for the Court to apply a rule of reason test: "when should non-price distribution restrictions, *normally tested under the rule of reason,* be condemned as part of *per se* unlawful price fixing?" Pet. Br. at 4 (Emphasis added). Monsanto, in short, asks that the case be resubmitted to a jury with an instruction that the conduct of Monsanto in this case without reference to the boycott issue is subject to the rule of reason and is not a *per se* offense.

Monsanto's Statement of the Case ignores the position of Monsanto before the trial judge. Monsanto at trial adopted the *per se* rule, agreed to its application, and did not submit rule of reason instructions to the District Court. Monsanto's position at that time was clear:

> These things are all the law. I just object to sitting there and having them [the jury] told five or six times that *it is per se illegal when you only need to be told once.*
>
> * * *
>
> Well, right at the beginning, I say that it is *per se illegal to use restrictions pursuant to a price fixing conspiracy.* . . . I would say it is also per se illegal for a manufacturer to utilize customer or territorial restrictions pursuant to a price fixing conspiracy or agreement.

Tr. 4049, 4054 (Emphasis added).

The jury was thus instructed without objection that a *per se* test should be used.

> Under Section 1 of the Sherman Act, there are agreements, conspiracies and combinations whose nature and effect on competition are conclusively presumed to be unreasonable and therefore illegal, without any inquiry as to the harm they have caused or the business excuse for their own use—they are "illegal per se."

Tr. 4355. Simple fairness would dictate that the Court be

advised that the trial court was never asked to give "rule of reason" instructions on the issues now raised.

Respondent respectfully suggests that neither petitioner nor the antitrust division should ask the Court to review a case to change the law when petitioner omits in the petition critical, adverse "record" references. The antitrust division essentially asks the Court to use this case for that purpose:

> Finally, it would now be appropriate for this Court fully to reexamine the legal status of resale price maintenance.
>
> * * *
>
> The Court should grant review in this case to address the question of the competitive analysis to be applied to all forms of vertical restraints, "price" and "non-price" alike.

Br. U.S. in Supp. of Pet. at 15, 16, 17-18. Indeed, the attention this case has received and the many requests by interested parties to file supporting amicus briefs, was caused in part by the suggestion that the Court change the rule and apply a rule of reason test to vertical price-fixing cases. The Court should not address that question through this case. Monsanto plainly agreed to try this case using jury instructions built on a *per se* violation.

At the close of all the evidence, Monsanto moved for a directed verdict. After the jury verdict, Monsanto moved for judgment notwithstanding the verdict. In each case, Monsanto did not ask the trial court to direct a verdict or enter judgment for Monsanto on the theory that the *per se* instruction was erroneous. No right to appeal exists on that point. This case was a hotly contested adversary proceeding in which Monsanto, represented by experienced counsel, tried the case on a *per se* theory, and expected to win the case. After the jury ruled for Spray-Rite, Monsanto now suggests that the rule of reason should apply to vertical price-fixing. The Court should not tolerate any such approach to serious litigation.

Indeed, the Court in the recent case of *Bowen* v. *United States Postal Service*, ____ U.S. ____, 103 S. Ct. 588 (1983), observed that:

> We need not decide whether the District Court's instructions on apportionment of damages were proper. The Union objected to the instructions only on the ground that no back wages at all could be assessed against it. *It did not object to the manner of apportionment if such damages were to be assessed.*

Id. at 599, n.19 (Emphasis added). It is hardly surprising that the Court would not review objections to jury instructions and legal positions which flow from such events if an opportunity was not first given to the District Court to rule on the matter, and yet that is precisely the position that Monsanto has assumed in this case.

Second. Monsanto agreed with distributors to boycott Spray-Rite. This jury conclusion, which is now final, supports the jury verdict rejecting Monsanto's explanation of the termination.

Monsanto's Statement of the Case would have the Court marshal the facts in airtight compartments to suit their needs, and thus ignores inferences that flow from Monsanto's successful boycott of Spray-Rite after 1968. A manufacturer's agreement with its distributors to boycott a competing distributor is simply illegal. *See, e.g., St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 543-46 (1978); *United States* v. *General Motors Corp.*, 384 U.S. 127, 146 (1966), *quoting Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 211 (1959). The jury's conclusion that a boycott existed was based upon direct evidence. Indeed, Monsanto instructed its distributors not to sell to Spray-Rite. The jury expressly found in answer to Monsanto's third special interrogatory[28] that Monsanto conspired with its

[28] The jury answered affirmatively the following special interrogatory requested by Monsanto:

> 3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto herbicides after 1968?

distributors to limit access to Monsanto's herbicides after 1968. The significance of this "boycott" is obvious: Monsanto was coming out with a revolutionary new product—the third generation herbicide called Lasso. *See supra* at 6-7.

As is fully considered in the detailed Counterstatement of the Case, *supra* at 16-20, Spray-Rite, after 1968, was simply prevented from obtaining Monsanto herbicides from other distributors who reluctantly agreed to Monsanto's position.

Associated Producers (another distributor) was told not "to sell to Don Yapp" (Spray-Rite). (Tr. 1951)

Mid-State Chemical was also told not to sell to Spray-Rite and if it did, would risk termination. (Tr. 274-75) The following year, the general manager of Mid-State stated, "I knew I could not sell to them or didn't think I was going to be able to get away with it". (Tr. 290-91) Finally, the distributor was told "do not make that sale [to Spray-Rite]". (Tr. 292)

Midwest Agriculture, another distributor, was told not to sell Monsanto products "outside of his area or else." (Tr. 846, 3621, 3624)

In short, the jury had every right to conclude in answer to Monsanto's special interrogatory that Monsanto obtained agreements from other distributors to curtail any sales to Spray-Rite: a classic boycott. The post-termination boycott evidence explains why the jury did not believe Monsanto's antiseptic explanation of the cause of termination.

Spray-Rite contended that Monsanto was attempting to eliminate price-cutters. Monsanto argued that the decision had no such motive but was caused by the failure of Spray-Rite to "hire salesmen." Monsanto's so-called Statement of

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(footnote continued)

Answer: ***Yes.***

Tr. Feb. 21, 1980, at 3 (Emphasis added).

the Case, moreover, reviews the evidence favorable to Monsanto on this issue as follows: "Monsanto witnesses testified that Spray-Rite was not renewed because it failed to hire additional salesmen and to adequately promote sales to dealers." Pet. Br. at 11. The jury plainly rejected this argument. How could the jury give credit to that explanation when immediately thereafter Monsanto engineered a boycott of Spray-Rite to keep Monsanto's products away from a "price-cutter?"

Monsanto's Statement of the Case virtually ignores the boycott issue and unfairly summarizes the record, adopting the proposition that the Court has no reason to consider such facts, which should be isolated from the "fact of termination." Needless to say, that argument is not a statement of facts and conflicts with the accepted judicial principle that all inferences from the evidence should be construed in favor of the winning party.

Third. Implicit in Monsanto's Statement of the Case is the erroneous suggestion that the only evidence of record is "mere complaints" from distributors preceding an unconnected "termination."

The Statement of the Case states a self-serving proposition based upon a limited and unfair review of the record: "can a *per se* unlawful price fixing conspiracy be inferred *solely* from the termination of a distributor following *price complaints* from other distributors?" Pet. Br. at 4 (Emphasis added). Spray-Rite objects to this Statement of the Case. As is fully considered, *infra,* the record is replete with substantial evidence regarding Monsanto's objectives and actions responding to Spray-Rite's price-cutting. Spray-Rite was terminated because it was a price-cutter and jeopardized Monsanto's market scheme to fix prices and stabilize the market. *See supra* at 9-16.

To summarize: Spray-Rite was told directly to stop price-cutting or face the loss of its distributorship. (Tr. 619) Some months later a Monsanto representative demanded

Spray-Rite's use of a suggested list price or face "retaliation." (Tr. 711) Monsanto representatives stated simply that if Spray-Rite and one other distributor could be "squared away", the market could be stabilized (Tr. 1945-46) In the month of Spray-Rite's termination, an authorized Monsanto distributor's newsletter noted the "absolute necessity of *getting the market place in order* with regard to the entire line of agricultural chemicals," and that Monsanto "is determined to do what it takes to rectify the situation from now on." (PX 233) (Emphasis added).

The termination explanation was specious. There was no independent Monsanto business reason for its termination of Spray-Rite. *See supra* at 15-16. Indeed, Spray-Rite was Monsanto's tenth largest distributor, performing extraordinary service to customers. *See supra* at 7-9. It could hardly be terminated for failure to hire salesmen, and yet, that is precisely Monsanto's explanation.

Monsanto's Statement of the Case simply ignores such evidence, and substitutes the proposition that the Seventh Circuit erred because it relied only on distributor complaints preceding a termination. Pet. Br. at 31. Any fair review of the Seventh Circuit's opinion demonstrates the inaccuracy of that assertion. This case, in short, involved considerably more than the mere "distributor complaints" which Monsanto describes as the "fundamental issue." Pet. Br. at 4. What has occurred in this case, as fully considered, *infra*, is that the Seventh Circuit's opinion has been read out of context without bothering to review the evidence cited by the Seventh Circuit.

The Court should not treat Monsanto's Statement of the Case as the facts relevant to this proceeding; rather, Spray-Rite respectfully suggests that Respondent's detailed Counterstatement of the Case, *supra*, fairly reviews the evidence which the jury had every right to accept and adopt in deciding this case for Respondent.

II. Assuming that Monsanto Can Argue in the Court a "Rule Of Reason" Test, Contrary to its Position in the District Court, the Court Should Not Change the Law and Alter or Reverse Decisions of the Court Which Have Applied the "Per Se" Test to Vertical Price-Fixing.

The Court recently stressed that "resale price maintenance [is] an activity that has long been regarded as a *per se* violation of the Sherman Act." *Rice* v. *Norman Williams Co.*, ___ U.S. ___, 102 S. Ct. 3294, 3299 (1982). In many decisions throughout the history of the antitrust laws, "[t]his Court has ruled consistently that resale price maintenance illegally restrains trade." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980). *See, e.g., United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944); *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85 (1920); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Any departure from the settled rule of *per se* illegality would ignore congressional intent. In 1975, Congress enacted the Consumer Goods Pricing Act, which repealed the Miller-Tydings and McGuire Acts, which had, for a certain time, eliminated the antitrust exemption for state laws which permitted so-called "fair trade" agreements. Pub. L. No. 94-145, 89 Stat. 801 (1975). Both legislative reports concerning the 1975 Act explicitly state the congressional intent that vertical price-fixing conspiracies be deemed *per se* unlawful. H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975); S. Rep. No. 466, 94th Cong., 1st Sess. 1 (1975). Several members of Congress stressed, without contradiction, that the effect of the Act was to invalidate all resale price maintenance agreements. 121 Cong. Rec. H7103 (1975) (remarks of Reps. Rodino and Jordan); *id.* at H7104 (Rep. Hutchinson); *id.* at H7105 (Rep. Van Deerlin); *id.* at H7106 (Rep. Seiberling); *id.* at S20872 (Sen. Brooke).

The Court has recognized this compelling evidence of legislative intent regarding the appropriate standard by

which to judge resale price maintenance contracts in a case involving vertical nonprice restraints:

> The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. . . . Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States . . . . No similar expression of congressional intent exists for nonprice restrictions.

Continental T.V., Inc. v. *GTE Sylvania Inc.*, 433 U.S. 36, 51, n. 18 (1977). *See also California Retail Liquors Dealers' Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102-03 (1980).

The Court properly defers to legislative intent, rather than formulate national economic policy, when confronted with questions concerning the scope of the antitrust laws. *See Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, ____ U.S. ____, ____, 103 S. Ct. 897, 904-05 (1983); *Texas Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639 (1981).

> [I]t certainly is 'not for [the Court] to indulge in the business of policy-making in the field of antitrust litigation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress'.

Jefferson County Pharmaceutical Ass'n v. *Abbott Laboratories*, ____ U.S. ____, ____, 103 S. Ct. 1011, 1023, (1983), *quoting United States* v. *Cooper Corp.*, 312 U.S. 600, 606 (1941). *See also* 103 S. Ct. at 1028, n.10 (O'Connor, J. dissenting). Congress has balanced the economic benefits and disadvantages of vertical price-fixing contracts, and concluded that such agreements should be *per se* unlawful.

The United States and other amici for the petitioner suggest that the Court summarily reject over seventy years of precedent and the economic principles of competition upon which that precedent is based, in favor of the legality of resale price maintenance schemes. As the Court concluded

last term, "arguments against application of the *per se* rules in this case therefore are better directed to the legislature." *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, ____, 102 S. Ct. 2466, 2478-79 (1982). The Solicitor General and petitioner are bold indeed to suggest that the Court abandon its precedents and, in effect, legislate in the face of conclusive congressional legislation to the contrary.

III. The Use of the Word "Allegation" in the Seventh Circuit's Opinion Should Not Be Used As a Pretext to Restate the Law: The Seventh Circuit's Use of That Expression Must Necessarily Be Taken in the Context of the Whole Opinion.

Monsanto and the antitrust division have repeatedly emphasized with italics the Seventh Circuit's use of the word "allegation." In its brief in support of the writ, the antitrust division objected to the Seventh Circuit's opinion because "non-price vertical restrictions can be deemed per se violations merely because they are alleged to be part of a resale price maintenance scheme." Br. U.S. in Supp. of Pet. at (I). In Monsanto's Statement of the Case, the Seventh Circuit is criticized again for interpreting *Sylvania* to apply only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices. Pet. Br. at 3. In short, sprinkled throughout Monsanto's petition and the briefs in support thereof is the suggestion that the Seventh Circuit should be reversed because of that court's use of the word "allegation." Pet. App. at 12.

This bootstrap argument should be rejected. The Seventh Circuit's analysis was a comparison of the Court's opinion in the *Sylvania* case, and the Court's decision in *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). The Court of Appeals noted that the Court in *Sylvania* was reviewing a case "involving non-price vertical location restrictions." Pet. App. at 12. The Seventh Circuit observed that the Court in *Sylvania* did not reverse *Sealy*, which held "that otherwise lawful vertical restrictions imposed as part of

an unlawful scheme to fix prices are *per se* unlawful." *Id.* The Court discussed the language in some detail and then concluded that "*Sealy* rather than *Continental TV* governs this case. *Continental TV* applies only if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices." *Id.*

The use of the word "allegation" in the context of the Seventh Circuit's analysis does not establish the proposition that only allegations, and not proof, are needed in antitrust cases. Monsanto's argument and repeated emphasis of the word "allegation" is plainly unfair. The Seventh Circuit was simply comparing the structure of the issues presented in *Sylvania* with the issues presented in *Sealy*.

Indeed, the antitrust division after stating that the Court of Appeals erred in the use of the word "allegation," states that the Court of Appeals should have said "proof adduced at trial" instead of "allegation." Br. U.S. in Supp. of Pet. at 9. The Court should not reverse the Seventh Circuit in an opinion which strikes the word "allegation" and substitutes the expression "proof adduced at trial." Any fair reading of the Seventh Circuit's opinion would recognize that the Court of Appeals did not endorse the proposition that no proof be adduced at trial and only allegations are needed to support a jury verdict.

After construing the Seventh Circuit opinion to suit this appeal, Monsanto then boldly states that "[t]here is no evidence that Monsanto's programs and policies were designed or used for the purpose of fixing resale prices." Pet. Br. at 27. This contention simply ignores substantial record evidence to the contrary. The Counterstatement of the Case, *supra* at 20-26, outlines in detail the programs and policies used by Monsanto to reduce price competition among its distributors and limit product shipments to the price-cutter, Spray-Rite. Monsanto's McCormick admitted that areas of primary responsibility were enforced by Monsanto

to "limit the price gouging and cutting, . . . to limit this competition amongst the distributors and, in turn, limit the price cutting . . . [and] stabilize the market." (Tr. 1636-38) The areas of primary responsibility were something "Monsanto was concerned about in an effort to provide price stability." (Tr. 2365-66)

The desire to control resale prices similarly prompted Monsanto to change the time for payment of the early order discount to the end of the selling season. According to Monsanto, the old practice was undesirable for the reason that since the preseason discount was not retained by some distributors, it created "depressed pricing practices" by distributors and "[e]nabled sub-distributors [such as Spray-Rite] to operate at distributor or slightly below distributor price well into the season." (PX 146, Tr. 1631)

Monsanto specifically invoked these restrictions to discourage its distributors from selling to Spray-Rite and thereby to prevent the re-introduction of Spray-Rite's disruptive price competition. The jury so found in answer to Monsanto's second special interrogatory.[20] Daniels told Mid-State that it "shall not sell Spray-Rite in Illinois" or risk termination. (Tr. 274-75) Monsanto's Albertson ordered Mid-State: "No, don't make that sale. He's somebody that we don't want you to sell to. And besides, he's out of your territory." (Tr. 292) In short this small sample of the evidence fully supports the jury's conclusion that all or part of Monsanto's programs and policies were part of a price-fixing conspiracy.

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[20] 2. Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto *pursuant to* a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides? Answer: *Yes.*

Tr., Feb. 21, 1980 at 2, 3 (Emphasis added).

IV. The Court Should Not Use this Case to Resolve Supposed Conflicts Between the Circuits on the Issue of the Amount of Proof Necessary to Establish a Vertical Price-Fixing Agreement Between a Manufacturer and Distributors.[30]

Any fair analysis of the record in this case would establish a jury question on vertical price-fixing under any sufficiency of the evidence standard. Monsanto argues that cases such as *Schwimmer* v. *Sony Corp. of America*, 677 F.2d 946 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S. Ct. 362 (1982), establish that mere complaints by distributors and a subsequent termination are not sufficient evidence to establish vertical price-fixing between the manufacturer and a distributor. Summarizing the facts of this case in such a manner may suit Monsanto's motive in convincing the Court to grant the writ, but it does not represent fairly the Seventh Circuit's opinion and ignores mountains of additional evidence other than "mere complaints."

As discussed *supra* at 17-21, Monsanto entered into an unlawful boycott agreement. The jury finding of a boycott has not been appealed by petitioner and, as such, is the law of this case. None of the other cases which allegedly create a conflict between the circuits referred to in petitioner's brief address a fact pattern in which a boycott was the final link in a price-fixing conspiracy.

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[30] Because of its affirmance of the vertical price-fixing verdict, the Seventh Circuit did not need to address Spray-Rite's alternate theory and evidence of combination:

> Because we hold that Spray-Rite presented sufficient evidence to support the jury's verdict on its theory that Monsanto terminated the Spray-Rite distributorship pursuant to a resale price maintenance agreement between Monsanto and some of its distributors, we need not decide whether Spray-Rite presented evidence to support a verdict based on the theory that Monsanto effectuated its resale price maintenance scheme by coercing distributors into adhering to Monsanto's suggested resale price.

Pet. App. at 17, n. 9.

It is true that the Seventh Circuit's opinion states: "We believe however that proof of termination following competitor complaints is sufficient to support an inference of concerted action." Pet. App. at 15. The Court of Appeals did not conclude its discussion with that sentence, but expressly "agreed" with the Eighth Circuit's decision in *Battle* v. *Lubrizol*: "Proof of a dealer's complaints to the manufacturer about a competitor dealer's price cutting and the manufacturer's action *in response* to such complaints should be sufficient to raise an inference of concerted action." Pet. App. at 15, *quoting Battle* v. *Lubrizol Corp.*, 673 F.2d 984 (8th Cir.), *rehearing granted* (8th Cir. 1982) (en banc) (Emphasis in original).

The Seventh Circuit exhibited no difficulty in concluding on the facts of this case that proof of termination "in response to" competitor complaints was more than enough to satisfy any legal test. The Court of Appeals specifically identified evidence to support its conclusion that Spray-Rite presented sufficient evidence to establish an inference of concerted activity between Monsanto and certain distributors.

The terminated dealer in *Battle* established that one competitor complained about prices to Lubrizol, that Lubrizol received these complaints, and that the company officials who made the decision to reduce supply were aware of the substance of the complaints. On that record, the Eighth Circuit concluded that there was "sufficient circumstantial evidence, when viewed most favorably to appellants, to suggest that Lubrizol terminated appellants' " supply of product "in order to protect Jenkins-Guerin [complaining competitor] from price competition." 673 F.2d at 993.

Spray-Rite established not only all the indices of concerted action that were present in the *Battle* fact pattern, but also that Spray-Rite received a multitude of warnings and threats of termination from Monsanto as well as being informed by Monsanto at the time of termination that Spray-Rite's pricing policy was the cause of its termination.

See supra at 14-15. Further, the boycott evidence in this case was not present in *Battle*. In addition, Lubrizol, unlike Monsanto, did not engage in a pervasive effort to stabilize the market price for its products. Finally, only one other dealer was complaining of Battle's pricing policy, whereas Spray-Rite incurred the wrath of a number of distributors who communicated their price complaints to and requested action from Monsanto.

Petitioner contends that the Court should reverse the Seventh Circuit because of an alleged different standard for determining the sufficiency of the evidence necessary to establish a price-fixing conspiracy in *Edward J. Sweeney & Sons, Inc.* v. *Texaco,* 637 F.2d 105 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981), and *Schwimmer* v. *Sony Corp. of America,* 677 F.2d 946 (2d Cir.), *cert. denied,* —— U.S. ——, 103 S.Ct. 362 (1982). While *Sweeney* and *Schwimmer* may differ in language from the Seventh Circuit's opinion in *Spray-Rite,* neither the plaintiff in *Sweeney* nor the plaintiff in *Schwimmer* was able to demonstrate the type of evidence that Spray-Rite presented to the trier of fact.

In *Sweeney* the terminated gasoline dealer had a poor service record, engaged in questionable credit card practices, and misrepresented non-Texaco gasoline as a Texaco product. Texaco's termination of a hauling allowance agreement with Sweeney saved Texaco approximately $60,000 per year. Such independent business reasons for termination do not exist in this record, and the jury so found.

Fischer specifically informed Yapp that he was terminated because of price complaints from other distributors. (Tr. 774, 1295) In addition, the volume and intensity of price complaints requesting termination was more extensive in *Spray-Rite*. Further, Texaco did not engineer a boycott of *Sweeney* after termination. Finally, contrary to *Spray-Rite*'s facts, the terminated dealer in *Sweeney* was not persistently threatened with termination.

In *Schwimmer* the Second Circuit refused to find sufficient evidence of a conspiracy between Sony and some of

its dealers to discourage transshipping of Sony products. The Second Circuit, citing *H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S.Ct. 176 (1982), held that Sony's dealers' complaints about transshipping did not support an inference of a tacit agreement. Plaintiff was unable to introduce any evidence other than dealer complaints to infer a conspiracy. Thus, the Second Circuit held that "other evidence of a tacit understanding or agreement" in addition to complaints is necessary to establish concerted action. 677 F.2d at 953.

The Seventh Circuit also relied on "evidence refuting Monsanto's alleged independent business reason for terminating Spray-Rite" to find other evidence of a conspiracy on which to impose section 1 liability on Monsanto. (Pet. App. at 17, n.8, *distinguishing H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935 (2d Cir. 1981), *cert. denied*, ___ U.S. ___, 103 S.Ct. 176 (1982). Since the Second Circuit requirement of "other evidence of a tacit understanding" as set forth in *Schwimmer* has its genesis in *H. L. Moore*, the Seventh Circuit by factually distinguishing *H. L. Moore* held that Spray-Rite presented sufficient evidence to satisfy any standard of proof. Even the jury instructions included a requirement that Spray-Rite present sufficient proof to establish a "tacit understanding." (Tr. 4352)

Monsanto agrees that "[t]o be probative of conspiracy, the circumstances of a distributor termination must establish a causal nexus between the complaints of other distributors and the manufacturer's decision to terminate." Pet. Br. at 37. Petitioner necessarily then must accept the Ninth Circuit's decision in *Filco v. Amana Refrigeration, Inc.*, ___ F.2d ___, [1983-1] Trade Cas. (CCH), ¶ 65,450 (9th Cir. 1983), which adopts a causal relationship standard, citing *Spray-Rite* and *Battle* with approval.[31]

[31] In *Filco* the Ninth Circuit held that both *Battle* and *Spray-Rite* required "evidence of a causal relationship between the competitor

While the language of the Seventh Circuit's opinion in *Spray-Rite* may be different from the *Schwimmer* and *Sweeney* cases, the evidence presented in *Spray-Rite* demonstrates a completely different case. The antitrust division and the petitioner would have the Court believe that by adopting different language from the Seventh Circuit's causal relationship test, the Court could reverse the Seventh Circuit's decision. Such is not the case. The true issue presented to the Court is whether *Spray-Rite* presented sufficient evidence to establish a vertical price-fixing agreement between Monsanto and some of its distributors. This paper or theoretical disagreement between *Sweeney* or *Schwimmer* and *Spray-Rite, Battle* or *Filco* disappears if the facts are examined. In short, Spray-Rite did indeed present sufficient evidence of a tacit understanding between Monsanto and some of its distributors to terminate Spray-Rite because of its price-cutting practices.

Moreover, the case really boils down to the instructions given to the jury. Monsanto's instructions are part of the jury charge. The jury was told: "The fact that distributors complain about prices or anything does not in itself mean that a conspiracy existed." (Tr. 4354) Further, that a manufacturer has the right to announce suggested retail prices and "refuse to sell to a distributor who refuses to abide by those suggested prices." (Tr. 4363) In short, the jury was told that a manufacturer can select any distributor it wants as long as it is not pursuant to a price-fixing conspiracy. (Tr. 4350-64) As fully discussed *supra*, Monsanto did not object to the *per se* instructions. Monsanto should not be permitted to try the case on one theory and then, years later, armed with instructions that were never submitted, return to the District Court for a new trial on a new theory.

Because Monsanto waived all of these points in the Dis-

(footnote continued)

dealer's price-related complaints and the manufacturer's action." [1983-1] Trade Cas. (CCH), ¶ 65,450 at 70,570 (9th Cir. 1983) (citations omitted).

trict Court, a secondary argument is made based on the notion that there is no evidence on which the jury would find for Spray-Rite. Any careful reading of the record, or fair summary of the facts, demonstrates that such a contention is simply specious, and the attempt to restructure the case as one involving "mere complaints" followed by an antiseptic, unconnected termination is a wholesale misstatement of the record.

Petitioner ignores two legal propositions in its warped record review. First, Monsanto's "evidence" is simply inconsistent with the jury verdict, and thus must be assumed to have been rejected by the jury. *See, e.g., Branti* v. *Finkel*, 445 U.S. 507, 512, n.6 (1980); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 703 (1969) (per curiam).

Second, petitioner seeks to impose a requirement that a terminated distributor must present *direct evidence* of a "causal nexus between the complaints of other distributors and the manufacturer's decision to terminate." Pet. Br. at 37. Because of the clandestine nature of concerted activity, "conspiracies are seldom capable of proof by direct testimony . . . ." *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914). Thus, the Court has consistently held that a price-fixing victim need not prove the existence of an agreement by direct evidence to prove an unlawful conspiracy. *See Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700, 704 (1969) (per curiam); *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-43 (1966); *United States* v. *McKesson & Robbins, Inc.*, 351 U.S. 305, 310 (1956); *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 540 (1954); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 809-10 (1946). Rather, "the essential agreement, combination or conspiracy might be implied from a course of dealing or other circumstances." *Frey & Son, Inc.* v. *Cudahy Packing Co.*, 256 U.S. 208, 210 (1921). *See also Albrecht* v. *The Herald Co.*, 390 U.S. 145, 149 (1968);

American Tobacco Co. v. United States, 328 U.S. 781, 809-10 (1946); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226, 227 (1939); Piraino, *Distributor Terminations Pursuant to Conspiracies Among A Supplier And Complaining Distributors: A Suggested Antitrust Analysis*, 67 CORNELL L. REV. 297, 315, 322 (1982).

Thus, the trial court properly determined in denying defendant's motions for directed verdict that Spray-Rite presented sufficient circumstantial evidence on which to infer the existence of a price-fixing conspiracy.

V. Conclusion

For the foregoing reasons, the Seventh Circuit's decision should be affirmed.

Respectfully submitted,

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July 13, 1983

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No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,
Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT SPRAY-RITE SERVICE CORPORATION

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SUPPLEMENTAL BRIEF OF RESPONDENT SPRAY-RITE SERVICE CORPORATION

Pursuant to Rule 35.5, Respondent Spray-Rite Service Corporation presents "newly enacted legislation" not available at the time Respondent filed its brief. Sup.Ct.R. 35.5. This legislation is directly relevant to the argument advanced by the government (*see* U.S. Amicus Br. at 6-7, 19-29) and acknowledged by Monsanto (Monsanto Br. at 23-24 n.25) that "resale price maintenance should not be deemed per se unlawful." U.S. Amicus Br. at 19. It also supports Point II of Respondent's Brief. Respondent's Br. at 39-41.

On November 28, 1983, President Reagan signed Public Law 98-166 (H.R. 3222), which provides in pertinent part:

> MAKING APPROPRIATIONS FOR THE DEPARTMENTS OF COMMERCE, JUSTICE, AND STATE, THE JUDICIARY, AND RELATED AGENCIES FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 1984. . . .
>
> * * *
>
> Sec. 510. None of the funds appropriated in title I and title II [Department of Justice and Related Agencies] of this Act may be used for any activity, the purpose of which is to overturn or alter *the per se prohibition on resale price maintenance in effect under Federal antitrust laws*. . . .

HR. 3222, 98th Cong., 1st Sess., 129 Cong. Rec. —— (1983) (Emphasis added). The Conference Report accompanying Public Law 98-166 states:

> The conferees continue to be concerned about the failure of the Antitrust Division of the Department of Justice to enforce the Nation's laws which prohibit vertical price fixing between manufacturers and retailers. Clearly, allowing manufacturers to fix prices has a detrimental effect on American consumers. The Supreme Court has ruled this type of price fixing is illegal, yet the Antitrust Division has adopted a policy of refusing to prosecute violations. . . . The conferees instruct the United States Department of Justice and all other appropriate Federal agencies to enforce the federal antitrust laws faithfully and vigorously, including the prohibition on resale price maintenance.

H.R. Rep. No. 478, 98th Cong., 1st Sess. 46 (November 3, 1983). *See also* 129 Cong. Rec. S14430-32 (daily ed. Oct. 21, 1983). Public Law 98-166 therefore establishes beyond peradventure Congress' intent and agreement with this Court that resale price maintenance is, and should remain, *per se* illegal. *See* Respondent's Br. at 39-41.

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MONSANTO COMPANY,

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On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

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Dated: November 9, 1983

CHAS. P. YOUNG CHICAGO, INC.

QUESTIONS PRESENTED

1. Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a *per se* rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?

2. Can a *per se* unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?

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Reply Brief Of Petitioner Monsanto Company[1]

This Court granted Monsanto's petition for certiorari to consider two antitrust issues of substantial importance to the nation's business community: (1) when should non-price distribution restrictions, normally tested under the rule of reason, be condemned *per se* as part of price fixing; and (2) can a *per se* unlawful price-fixing conspiracy be inferred from the termination of a distributor following price complaints from other distributors?

Spray-Rite does not address these questions of antitrust policy. Instead, it argues the evidence and urges this Court to affirm the judgment below without considering the issues or defining the proper legal standards. The essence of its argument is that the verdict is supported by evidence that Monsanto received price complaints from distributors, that

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[1] The statement of Parties to the Proceedings pursuant to Supreme Court Rule 28 appears at page ii of the petition. In the interim, Monsanto has acquired a 50% interest in Korsil Company, Ltd.

Monsanto was concerned about resale prices and distributor margins, and that Monsanto's non-price programs would tend to influence resale prices.

Spray-Rite's approach underscores the anticompetitive consequences of the Seventh Circuit's decision. The evidence on which both the Seventh Circuit and Spray-Rite rely will typically be present in a competitive market, particularly where, as here, a manufacturer employs non-price programs requiring promotional efforts by distributors. In sustaining a price-fixing verdict on the basis of such normal marketplace evidence, the Seventh Circuit's decision adopted two legal standards that permit juries to speculate in applying *per se* rules. First, it permits juries to condemn non-price restrictions under a *per se* rule based on a mere allegation that they are part of price fixing, without requiring proof linking them to a price-fixing scheme. Second, it permits juries to infer the underlying price-fixing conspiracy from normal marketplace evidence of price complaints, price concern and termination, without requiring proof of a causal connection between complaints and termination. If permitted to stand, the decision will deter procompetitive conduct by exposing manufacturers to *per se* liability whenever they employ non-price restrictions or terminate distributors.

In *Sylvania* this Court recognized that non-price distribution restrictions like those at issue here may promote interbrand competition—the primary concern of antitrust law—and therefore held that they must normally be tested under the rule of reason.[2] At trial Spray-Rite disavowed any claim that Monsanto's programs were unlawful under the rule of reason and agreed that Monsanto became a more effective competitor after their introduction. (Pet. Br. 8, 12-13)[3] By permitting *per se* condemnation of these demonstrably

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[2] *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-52 & n.19 (1977).

[3] The following abbreviations are used in this Brief: "J.A." (joint appendix filed in this Court by petitioner and respondent);

(footnote continued on next page)

procompetitive programs without requiring proof linking them to price fixing, the Seventh Circuit's decision largely restores the *per se* rule that *Sylvania* overruled.

Sound antitrust policy requires rational tests for determining when a vertical price-fixing conspiracy may be inferred and when non-price restrictions may be condemned *per se* as part of price fixing. Spray-Rite ignores the need for such tests and offers no credible defense of the Seventh Circuit's standards. Monsanto's position, consistent with this Court's precedents, is that non-price restrictions should not be condemned as part of resale price fixing absent proof, *first*, that a manufacturer and its distributors conspired to control resale prices and prevent intrabrand price competition and, *second*, that the non-price restrictions were designed or used to implement that conspiracy. (Pet. Br. 24-27, 41-43)

Tested under the proper standards, the verdict cannot stand. There is no evidence that Monsanto controlled the resale prices of its herbicides or prevented price competition among distributors. To the contrary, uncontested evidence established that there was vigorous interbrand and intrabrand price competition both before and after Spray-Rite's termination. (Pet. Br. 11) Nor is there any evidence of a causal connection between distributor price complaints and Spray-Rite's termination. Finally, there is no evidence that Monsanto's non-price programs did or logically could support a conspiracy to fix the prices of Monsanto herbicides.

The legal arguments advanced by Spray-Rite miss the mark, addressing issues not raised by this appeal. Contrary

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"Cert. Pet." (petition of Monsanto Company for writ of certiorari); "Pet. App." (appendix to petition of Monsanto Company for writ of certiorari); "Pet. Br." (brief on the merits of petitioner Monsanto Company); "Resp. Br." (brief on the merits of respondent Spray-Rite Service Corporation); "Tr." (trial transcript); "PX" (plaintiff's trial exhibit); "DX" (defendant's trial exhibit).

to Spray-Rite's characterization of Monsanto's argument, Monsanto does not challenge the jury instructions that resale price fixing and distribution restrictions that are part of such price fixing are *per se* unlawful. Monsanto's consistent position at trial, on appeal, and in its petition has been that Spray-Rite failed, as a matter of law, to prove either the existence of an underlying price-fixing conspiracy or Monsanto's use of distribution programs as part of such a conspiracy.[4] Monsanto's agreement to the substantive jury instructions on Spray-Rite's claims does not preclude it from challenging Spray-Rite's failure to prove the elements of those claims or from challenging the erroneous standards applied by the Seventh Circuit in holding the evidence sufficient.

Nor is Monsanto asking this Court to "change the law". (Resp. Br. 39) To the contrary, Monsanto's position is that the Seventh Circuit's decision conflicts with this Court's precedents. While the Court may accept the argument of the United States that resale price maintenance should be tested under the rule of reason, Monsanto's argument is independent of that issue. The decision below cannot stand under existing precedent.

I. Monsanto's Procompetitive Non-Price Practices Were Condemned Under an Improper *Per Se* Rule and Were Not Part of Price Fixing.

This is the first case involving the antitrust legality of non-price distribution restrictions to reach this Court since *Sylvania*. The issue presented by Monsanto's petition is when such restrictions may be condemned *per se* as part of price fixing.[5] The legal standard adopted and applied by the

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[4] Monsanto thus moved for a directed verdict and judgment notwithstanding the verdict on both issues and appealed the denial of those motions. (Pet. Br. 13-14)

[5] Contrary to Spray-Rite's contention (Resp. Br. 33), Monsanto does not argue that the legality of its non-price programs should have been submitted to the jury under a rule of reason instruction. Monsanto submitted such an instruction at trial, but

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Seventh Circuit permits a jury to condemn non-price restrictions as *per se* unlawful merely because a plaintiff alleges that they are part of price fixing. That standard is not a rational test for distinguishing between restrictions that are in fact part of unlawful price fixing and those that *Sylvania* held should be evaluated under the rule of reason.

Spray-Rite offers no credible defense of the Seventh Circuit's standard and ignores the decision's conflict with the policies expressed in *Sylvania*. Instead, Spray-Rite argues that there is sufficient evidence of a connection between some of Monsanto's non-price programs and the alleged price fixing. Viewed most favorably to Spray-Rite, the evidence shows nothing more than an intent to provide distributors with margins sufficient to support promotional programs and efforts to restrict particular distributors' sales territories. (Resp. Br. 20-26) Under the proper test, this evidence is insufficient as a matter of law to establish that Monsanto's distribution programs were part of a price-fixing scheme.

A. The Seventh Circuit's Mere Allegation Standard Will Deter Use of Procompetitive Non-Price Programs, in Conflict With *Sylvania*.

The Seventh Circuit held that Spray-Rite's claim was properly submitted to the jury under a *per se* instruction because Spray-Rite *alleged* Monsanto's non-price programs were part of price fixing:

> *United States* v. *Sealy* rather than *Continental T.V.* governs this case. *Continental T.V.* applies only if there is no *allegation* that the territorial restrictions are part of a conspiracy to fix prices. Spray-Rite contended, and the jury was instructed, that Monsanto's vertical nonprice restrictions were part of

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withdrew it when Spray-Rite abandoned any claim that those programs were unlawful under the rule of reason. (Tr. 3983) Monsanto's position has consistently been that there was insufficient evidence linking the programs to price fixing and that the issue therefore should not have been submitted to the jury.

> an unlawful scheme to fix prices. Thus, *Sealy* and its progeny prescribe the *per se* rule.

684 F.2d at 1237, Pet. App. A-12 (emphasis added; page references omitted). This was plain error. After *Sylvania*, non-price restrictions must be tested under the rule of reason unless there is sufficient evidence linking them to price fixing.

Spray-Rite tries to dismiss the significance of the Seventh Circuit's standard, arguing that the court "was simply comparing the structure of the issues presented in *Sylvania* with the issues presented in *Sealy*." (Resp. Br. 42) The fallacy in this argument is that the court did not apply *Sealy* or any other precedent in holding that there was sufficient evidence to condemn Monsanto's non-price programs under a *per se* rule.[6] The court neither stated nor applied any test other than its mere allegation standard. That standard is inconsistent with both *Sealy* and *Sylvania*.

In *Sealy* this Court condemned territorial restrictions as part of horizontal price fixing based on specific findings that those restrictions "gave to each licensee an enclave in which it could and did zealously and effectively maintain resale prices, free from the danger of outside incursions." *United States* v. *Sealy, Inc.*, 388 U.S. 350, 356 (1967). By contrast, applying its mere allegation standard, the Seventh Circuit required no proof that Monsanto's non-price programs were designed or used to implement price fixing. Had it analyzed the evidence under the proper legal standard, the court could not have found any connection between those programs and price fixing.

The practical effect of the decision below is to nullify the antitrust policy adopted in *Sylvania*. Since distribution restrictions inherently limit intrabrand price competition and indirectly affect price, a disgruntled distributor can always allege that they are related to price fixing and are *per*

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[6] *See* 684 F.2d at 1242 n.11, Pet. App. A-22 n.11.

se illegal. That is precisely Spray-Rite's position. Permitting a plaintiff to reach the jury under a *per se* standard merely by alleging that distribution restrictions are part of price fixing, however, will necessarily discourage the procompetitive use of such restrictions.

Because all vertical distribution restrictions have some indirect effect on price, a rational test is needed to distinguish between those restrictions that are in fact part of price fixing and those that should be tested independently under the rule of reason. Only then can manufacturers safely utilize efficiency-enhancing distribution restrictions, as this Court intended in *Sylvania.* Under the correct test, non-price restrictions should not be condemned as part of price fixing absent proof that a price-fixing conspiracy exists and that the restrictions were designed or used to control resale prices and prevent intrabrand price competition. The Seventh Circuit's mere allegation standard embodies no such requirement.

B. The Record Does Not Support the Verdict that Monsanto's Non-Price Practices Were Part of Price Fixing.

Spray-Rite stresses evidence that Monsanto's non-price programs and policies were intended "to maintain, and increase, profit margins in distribution channels," "to keep the price levels and profit levels as attractive as possible," and "to provide price stability." (Resp. Br. 21, 23) Those programs and policies, as described more fully in Monsanto's brief, consisted of: (1) payments to distributors for selling to retail dealers, for educating dealers and farmers about Monsanto's products, and for stocking dealers' shelves early in the selling season, (2) assignment of each distributor to a non-exclusive area of primary responsibility, and (3) permitting the distributor to pick up products only at warehouses within that area and providing free delivery to the distributor or its customers only within that area. (Pet. Br. 6-7)

Spray-Rite argues that these programs were part of price fixing because they would tend to discourage extraterritorial

sales and sales to non-dealers, thereby operating as territorial and customer restrictions and influencing resale prices. (Resp. Br. 20-26; *see* Pet. Br. 27-29) But non-price distribution restrictions inherently reduce intrabrand price competition, limit price cutting, and support distributors' margins. Those are *precisely* the economic effects this Court considered when it decided in *Sylvania* that such restrictions, because of their potential for enhancing distribution efficiency and stimulating interbrand competition, should not be condemned *per se*. As the Court recognized, such restrictions "induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer," "induce retailers to engage in promotional activities or to provide service," and limit the "free rider" effect—distributor price-cutting made possible by saving the cost of promotional activities provided by other distributors. 433 U.S. at 55.

All of these procompetitive effects depend on providing some protection for distributor margins by reducing intrabrand price competition. Only in this manner can non-price restrictions induce distributors to promote the manufacturer's products aggressively and to provide desirable services. *See, e.g.*, Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 4 (1977). The inherent indirect effect on resale prices, however, does not equate with unlawful price fixing. *See also Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8-9, 23 (1979).

Monsanto's non-price programs worked exactly as contemplated in *Sylvania*. They induced distributors to focus on product promotion, provided better product information to customers, increased the availability of Monsanto products on retailers' shelves, encouraged distributors to develop the market potential for Monsanto herbicides, and increased the efficiency of Monsanto's distribution system. (Pet. Br. 5-7, 29) These programs stimulated interbrand competition, as demonstrated by subsequent changes in the structure and

performance of the herbicide market. In 1968, before Monsanto adopted the challenged programs, it was a weak competitor facing entrenched rivals. It was confronted with a choice between improving its competitive position or quitting the market. By 1972 Monsanto had become an effective competitor. Its sales had increased; its market share had improved; market concentration had declined; and industry output had increased.[7] (Pet. Br. 4-5, 7-9)

There is simply no evidence linking Monsanto's non-price programs to price fixing. Spray-Rite relies principally on evidence that, at most, shows attempts to prevent certain distributors from selling outside their primary responsibility areas. (Resp. Br. 22-25) Spray-Rite argues that these efforts tended to promote price stability by reducing the number of distributors competing in an area and, therefore, were part of price fixing. At most, Spray-Rite's argument is that Monsanto's responsibility areas operated as territorial restrictions and reduced intrabrand price competition. Again, *Sylvania* recognized that "[v]ertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers," 433 U.S. at 54, but nevertheless held that such restrictions are not *per se* unlawful.

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[7] Spray-Rite implies that the "proprietary" herbicides of Monsanto and other manufacturers were not in competition and that the increase in Monsanto's sales was attributable to its introduction of a new product, Lasso, in 1969, rather than to the non-price programs it introduced that year. (Resp. Brief at 4-5, 6-7) But Spray-Rite's own economic expert agreed that "the herbicide industry was a highly competitive industry" and that Monsanto improved its market position not only because it had good products, but also because it hired more salesmen, promoted its products and emphasized technical selling. (Tr. 2990, 2993-95) The successful introduction of Lasso cannot be divorced from the promotional programs that accompanied it, particularly those that focused on distributors' educational and promotional efforts. (*See* PX 139 at 38, Tr. 1607, 3034, 3035, 3307, 3309-10)

Spray-Rite does not contend that Monsanto's non-price programs eliminated intrabrand price competition. It identifies no evidence that those programs were designed or used to control resale prices and prevent intrabrand price competition.[8] Indeed, it has never explained how those programs could have supported price fixing in light of their nature. (Pet. Br. 27-29) Spray-Rite does not dispute that Monsanto assigned 10 to 20 distributors to each primary responsibility area. (Pet. Br. 28) Thus, even if Monsanto had rigorously enforced those non-exclusive areas as ironclad territorial restrictions, they could not have given each distributor "an enclave in which it could . . . effectively maintain resale prices, free from the danger of outside incursions." *United States* v. *Sealy, Inc.*, 388 U.S. at 356.[9]

In sum, Spray-Rite has failed to defend the Seventh Circuit's mere allegation standard or to address the policy concerns it raises. There is no evidence linking Monsanto's non-price programs to price fixing under the correct standard.

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[8] Spray-Rite's misquotation of testimony by former Monsanto employee McCormick conveys an incorrect impression that Monsanto intended to create exclusive territories to prevent price competition among distributors. Spray-Rite quotes McCormick as testifying that "if we could keep our distributors out of a state, this would stabilize the market." (Resp. Br. 23)(emphasis deleted) McCormick actually testified that "if we could keep *four* distributors out *in* a state, this would stabilize the market." (Tr. 1936-37)(emphasis added) At most, this evidence suggests a desire to "reduce intrabrand competition by limiting the number of sellers . . . competing for the business of a given group of buyers." *Sylvania*, 433 U.S. at 54. As such, it is fully consistent with the lawful use of territorial restrictions to induce distributor promotional efforts and discourage free riding.

[9] Monsanto's primary responsibility areas did not operate as ironclad territorial restrictions. Spray-Rite does not dispute that Monsanto distributors sold substantial quantities of Monsanto products to customers outside their primary responsibility areas. (Pet. Br. 28-29)

This Court should therefore reverse the judgment with respect to those programs and direct the court of appeals to remand to the district court for entry of judgment on behalf of Monsanto.

II. The Price-Fixing Verdict Was Affirmed Under an Improper Conspiracy Rule and Cannot Be Sustained on Any Theory of *Per Se* Unlawful Price Fixing.

Spray-Rite's argument on the conspiracy issue likewise avoids the question presented for review. This Court granted certiorari on the question whether a *per se* unlawful price-fixing conspiracy can be inferred "solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract." (Cert. Pet. i) Spray-Rite neither defends the Seventh Circuit's conspiracy standard nor suggests any test for inferring a conspiracy from the circumstances of a distributor termination. Instead, Spray-Rite argues that the evidence establishes a conspiracy under "any legal test." (Resp. Br. 45) Tested under the proper standard, that evidence is insufficient as a matter of law.

A. The Seventh Circuit Improperly Held that "Termination Following Competitor Complaints Is Sufficient to Support an Inference of Concerted Action."

Spray-Rite does not dispute that an antitrust conspiracy may be proven by circumstantial evidence only if that evidence is "significantly probative of conspiracy." *See* Pet. Br. 32, quoting *First National Bank* v. *Cities Service Co.*, 391 U.S. 253, 288 (1968). Spray-Rite agrees with Monsanto that "[t]o be probative of conspiracy, the circumstances of a distributor termination must establish a causal nexus between the complaints of other distributors and the manufacturer's decision to terminate." (Resp. Br. 47, quoting Pet. Br. 37) Finally, Spray-Rite does not contend that the factors comprising the Seventh Circuit's conspiracy standard—distributor price complaints, a manufacturer's concern with

resale prices and termination—establish the requisite causal nexus. Thus, Spray-Rite fails to meet the issue raised by Monsanto's petition.

Spray-Rite also ignores the policy implications of the Seventh Circuit's conspiracy standard. That standard will deter procompetitive behavior in two ways. First, it will inhibit manufacturers from unilaterally terminating distributors even where termination would advance a manufacturer's distribution efficiency, to the ultimate benefit of consumers. Second, by attaching conspiratorial significance to normal communications between manufacturers and their distributors, the Seventh Circuit's standard will impede the flow of information crucial to maintaining efficient distribution mechanisms. These anticompetitive effects will be greatest where manufacturers require promotional efforts by their distributors. (*See* Pet. Br. 36)

Again, Spray-Rite tries to minimize the anticompetitive consequences of the Seventh Circuit's conspiracy standard by arguing, in effect, that the court did not mean what it said. Thus, Spray-Rite suggests that the court added meaningful content to the standard with its passing statement that evidence of termination "in response to" complaints "is sufficient to raise an inference of concerted action." 684 F.2d at 1239, Pet. App. A-15 to -16. The Seventh Circuit's standard, however, does not *require* evidence that the termination was in response to complaints. *Id.*, Pet. App. A-16. In holding that the evidence was sufficient to establish conspiracy, the court did not identify any evidence that the termination was in response to distributor complaints.

B. The Record Does Not Support the Verdict that Spray-Rite Was Terminated Pursuant to a Price-Fixing Conspiracy.

Spray-Rite's argument is largely a detailed, and often erroneous,[10] recitation of evidence regarding distributor complaints and Monsanto's concern about resale prices. In reciting this evidence, Spray-Rite loses sight of the principle that only concerted behavior is actionable under Section 1 of the Sherman Act. Distributor complaints and a manufacturer's concern about prices, without more, are not probative of concerted action because they fail to establish the necessary causal nexus between complaints and termination. Spray-Rite's effort to discredit Monsanto's explanation for the termination adds nothing. Under Section 1, Monsanto's reason for terminating Spray-Rite is irrelevant absent evidence that the termination resulted from agreement between Monsanto and the complaining distributors. None of the evidence marshalled by Spray-Rite, viewed in the light most favorable to it, supports the inference of such an agreement.

Evidence of Complaints. Spray-Rite recounts in detail the complaints received by Monsanto, but fails to address the economic reality that such complaints are normal marketplace reactions by competitors to the activities of their rivals. (Resp. Br. 9-15) Where, as here, a manufacturer's marketing strategy requires distributors to provide promotional services

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[10] For example, Spray-Rite repeatedly relies on an unsworn statement of former Monsanto employee Stein as substantive evidence of a price-fixing conspiracy. (*See, e.g.*, Resp. Br. 10, 21, 22, 28-29) In the Seventh Circuit, Monsanto argued that Stein's statement, which had been used during his deposition for impeachment, was improperly received in evidence. (*See* Brief for Defendant-Appellant Monsanto Company at 63-64; Reply Brief of Monsanto Company at 26-28) The court of appeals agreed that the district court erred in admitting Stein's "speculative testimony," but ruled the error "harmless." 684 F.2d at 1244, Pet. App. A-26 to -27.

that increase distributor costs, complaints about the activities of perceived free riders are inevitable. (Pet. Br. 34-35)

Although it attempts to magnify the significance of the complaints through repetition, Spray-Rite identifies no evidence connecting them to its termination.[11] Significantly, in discussing the complaint evidence Spray-Rite omits the dates of most of the complaints. All of these complaints were received either long before or after Spray-Rite's termination. There is no evidence of any complaint about Spray-Rite in the 15 months before termination. During this period, Monsanto renewed Spray-Rite as a distributor. Indeed, Monsanto continued Spray-Rite's distributorship from 1957 until late 1968 even though it was always aware of Spray-Rite's price-cutting and had received price complaints about Spray-Rite beginning at least as early as 1964. (Pet. Br. 39; Resp. Br. 10) Given these undisputed facts, the price complaints relied on by Spray-Rite are not probative of a conspiracy to terminate Spray-Rite.

Faced with this crucial deficiency in its proof, Spray-Rite relies on conjecture and surmise to supply the missing causal connection. Thus, it asserts that two alleged termination threats by Monsanto to Spray-Rite in 1966 and 1967 were prompted by distributor complaints. (Resp. Br. 13-14) Both of these alleged threats related to Spray-Rite's prices to Myers, Inc. Yet, there is no evidence that any distributor ever complained about Spray-Rite's prices to Myers. Building on its unsupported assertion, Spray-Rite further theorizes that "the jury could easily have inferred" that a 1968 telephone call from Monsanto to Spray-Rite regarding its prices to Myers "was the result of one or more distributor complaints." (*Id.* at 14 n.16) Such an inference could be based only on speculation, which this Court has prohibited as

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[11] The Seventh Circuit mistakenly stated that some complaining distributors "requested" that Monsanto terminate Spray-Rite. 684 F.2d at 1239, Pet. App. A-16. There is no evidence of such requests, and Spray-Rite does not contend that such evidence exists.

the basis for a jury verdict. *See Galloway* v. *United States*, 319 U.S. 372, 396 (1943).

Spray-Rite also mischaracterizes a post-termination conversation between Monsanto's Fischer and Spray-Rite's owner, Donald Yapp, as an admission that Monsanto terminated Spray-Rite in response to distributor price complaints. Relying solely on Yapp's testimony, Spray-Rite states "[t]he first thing that Fischer told Yapp at the 1968 meeting regarding Spray-Rite's termination was that Monsanto had received many complaints about Spray-Rite's prices." (Resp. Br. 14 n.14; *see also* Resp. Br. 15) Yapp did not testify, however, that Fischer referred to price complaints from *distributors* rather than the complaints from Monsanto's own employees. Later, Spray-Rite compounds this speculation, asserting that Yapp was "informed by Monsanto at the time of termination that Spray-Rite's pricing policy was the cause of its termination. *See supra* at 14-15." (Resp. Br. 45-46) There is no evidence to support this assertion.

Price Concern Evidence. The evidence of Monsanto's interest in resale prices similarly fails to provide the requisite causal link. Monsanto's interest in price levels, its internal discussions about distributor prices, and its attempts to ascertain distributors' resale prices do not make the conspiracy inference more plausible than the competing inference of lawful unilateral termination. Resale prices bear directly on a manufacturer's sales and profitability. Where a manufacturer has initiated programs requiring distributor promotion and service, resale prices also affect distributors' incentive and ability to support those programs. In short, interest in prices is to be expected of a manufacturer acting unilaterally in its economic self-interest and is therefore not probative of conspiracy. (*See* Pet. Br. 34)

Spray-Rite also suggests that Monsanto's desire to maximize its profits on its new herbicide, Lasso, supports the conspiracy inference. (Resp. Br. 26-27) Maximizing profits simply is not inconsistent with lawful, unilateral conduct.

The profit motive is the driving force in a competitive economy. Thus, evidence of Monsanto's interest in the pricing of Lasso or its other products cannot support the conspiracy inference.

Boycott Evidence. Lacking evidence of a causal nexus between complaints and termination, Spray-Rite seeks support in the jury's separate finding of a post-termination boycott. The boycott verdict, however, was premised on a later conspiracy that was entirely separate from the earlier alleged price-fixing conspiracy.[12] Moreover, the Seventh Circuit did not rely on the group boycott in holding that the jury could infer a price-fixing conspiracy from termination following distributor complaints.[13] On this basis alone, the group boycott is irrelevant to the question presented for review.

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[12] The jury was instructed that Spray-Rite claimed, *first*, that Monsanto conspired with distributors to fix prices and as part of that conspiracy terminated Spray-Rite and instituted territorial restraints and, *second*, "[t]hat after plaintiff's termination defendant and one or more of its distributors conspired or combined to restrict plaintiff's access to defendant's products." (J.A. A-19 to -20, Tr. 4350) Similarly, the special interrogatories asked the jury to answer whether Monsanto had engaged in two separate conspiracies: a conspiracy between Monsanto and "one or more of its distributors to fix, maintain, or stabilize resale prices on Monsanto herbicides" (Special Interrogatory No. 1, J.A. A-27), and a post-termination conspiracy involving Monsanto and "one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto's herbicides after 1968" (Special Interrogatory No. 3, J.A. A-28). On appeal Spray-Rite again claimed two separate conspiracies. (*Compare* Spray-Rite's brief before the Seventh Circuit at 5 *with* 15 and *compare* 46-57 *with* 61-68.)

[13] *Compare* 684 F.2d at 1235-36, 1240, Pet. App. A-9 to -11, -18 (discussing the group boycott) *with* 684 F.2d at 1233-35, 1238-40, Pet. App. A-5 to -9, -14 to -17 (discussing price fixing and termination).

Nor does the boycott verdict logically support the inference of a conspiracy to terminate Spray-Rite. The premise of Spray-Rite's termination claim was that Monsanto *acceded* to the desires of complaining distributors in terminating Spray-Rite. Its boycott claim was the reverse: that Monsanto *coerced* some of its distributors into refraining from selling to Spray-Rite after termination.[14] (Resp. Br. 35-36) Thus, Spray-Rite posited two separate conspiracies with two distinct groups of distributors as co-conspirators. The finding of an alleged post-termination conspiracy with one group of distributors contributes nothing to the hypothesis that Monsanto had earlier conspired with a different group of distributors to terminate Spray-Rite.

Equally unavailing is Spray-Rite's argument that "Monsanto's business explanation for Spray-Rite's termination is inconsistent with the post-termination boycott." (Resp. Br. 16) Regardless of the circumstances under which a distributor is terminated, there are numerous business reasons why a manufacturer might subsequently participate in an effort to restrict that distributor's access to its products. For example, a manufacturer might agree with its existing distributors to do so in order to prevent the former distributor from free riding.[15] Apart from the question of its legality, such action is fully consistent with unilateral termination of the distributor to protect the manufacturer's marketing

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[14] The Seventh Circuit's affirmance of the boycott verdict was premised solely on evidence that some Monsanto distributors declined to sell to Spray-Rite after termination, that Monsanto "threatened" one distributor with termination if it sold to Spray-Rite, and that it told another distributor not to sell to Spray-Rite. 684 F.2d at 1240, Pet. App. A-18.

[15] *See* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1, 6-7 (1977); Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *a Way Out?*, 67 Va. L. Rev. 1457, 1502-05 (1981). *See generally* R. Bork, *The Antitrust Paradox*, 330-46 (1978).

strategy, or for any other reason. The finding that Monsanto engaged in a post-termination boycott is therefore not probative of an earlier and separate conspiracy to terminate Spray-Rite.

Even assuming the boycott discredited Monsanto's explanation for termination, that would not support the inference that the termination was concerted. Spray-Rite's argument is that the boycott establishes a price motivation for termination. (Resp. Br. 16, 35-38) Improper motive, however, does not equate to concerted action. Consistent with this Court's precedents, the Seventh Circuit recognized that "[a] manufacturer's unilateral termination of a distributor is not unlawful regardless of whether it is motivated by an illegal purpose." 684 F.2d at 1234, Pet. App. A-7; *see United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960); *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919). In short, Monsanto's motive for terminating Spray-Rite is simply not probative of an agreement with other distributors.

C. The Record Does Not Support the Verdict that Monsanto Conspired to Fix the Prices of Its Herbicides.

Having failed to identify evidence probative of a conspiracy to terminate, Spray-Rite cannot sustain the price-fixing verdict under any other theory of vertical price fixing.[16] The undisputed evidence of price behavior in the herbicide market belies the existence of a price-fixing conspiracy. There was vigorous price competition among Monsanto distributors both before and after Spray-Rite's termination. Monsanto's distributors regularly sold below

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[16] Spray-Rite fails to address whether the Seventh Circuit was justified in holding that the termination of a single price-cutter, if concerted, constitutes *per se* unlawful price fixing. In so holding, the court created a new category of *per se* price fixing in violation of this Court's admonition that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972).

suggested resale prices, and their prices were not uniform. (Pet. Br. 11-12) As one of Spray-Rite's witnesses testified, "Price cutting was a way of life with distributors." (Tr. 2234) No distributor ever conformed its resale pricing as a result of any coercion by Monsanto.[17] The uncontested evidence of pervasive price competition among Monsanto distributors negates any inference that Monsanto and its distributors conspired to fix prices.

In contrast to the circumstantial evidence that this Court has held probative of a vertical price-fixing conspiracy, the record here is devoid of any evidence that Monsanto controlled distributors' resale prices or prevented intrabrand price competition. There is no evidence of written resale price maintenance agreements between Monsanto and its distributors, *cf. Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), no evidence of implied agreements having the purpose or effect of pervasive resale price maintenance, *cf. United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), and no evidence that Monsanto coerced its distributors into adhering to suggested prices, *cf. United States* v. *Parke, Davis & Co.*, 362 U.S. 29 (1960). In sum, there is no evidence of a price-fixing conspiracy, and the issue should not have been submitted to the jury.

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[17] Contrary to Spray-Rite's assertion, there is no evidence that Monsanto applied coercion to distributors Terra and American Oil Company to conform their prices. The transcript pages cited by Spray-Rite do not show that either distributor acquiesced to price coercion by Monsanto. *Compare* Resp. Br. 29-30 *with* Tr. 1880-90, 1931-34.

CONCLUSION

For the foregoing reasons, the judgment of the Seventh Circuit should be reversed, with directions to remand to the district court for entry of judgment on behalf of Monsanto on both issues presented.

Respectfully submitted,

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No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF OF ASSOCIATES FOR ANTITRUST ANALYSIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER AND MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER.

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MOTION FOR LEAVE TO FILE OUT-OF-TIME BRIEF AS AMICUS CURIAE IN SUPPORT OF PETITIONER.

Amicus Curiae respectfully moves for leave to file out-of-time the attached Brief *Amicus Curiae* in Support of Petitioner. The time for filing such briefs expired May 14, 1983. The consent of both parties, however, has been obtained for the filing of this brief and both parties have consented to its being filed out-of-time. Letters to this effect from counsel for both parties have been filed with the Clerk of this Court. It appears that respondent will not be prejudiced by the filing of the brief out-of-time since it has sought and obtained an extension of time to file its own briefs in this matter. Respondent will, therefore, be able to answer or comment on this brief in its own filings should it so desire.

It also appears that the attached brief makes an argument for reversal that was not made either by petitioner or by other parties filing briefs *amicus curiae* on its behalf.

Respectfully submitted,

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Respondent.

BRIEF OF ASSOCIATES FOR ANTITRUST ANALYSIS AS AMICUS CURIAE IN SUPPORT OF PETITIONER.[1]

Interest of Amicus Curiae.

Associates for Antitrust Analysis (AAA) is a group of faculty members from UCLA interested in the application of economic principles to government regulation in general and to antitrust law in particular. A list of members is attached as Appendix A. Financial support for this brief has been provided by the Center for the Study of Political Economy, Graduate School of Management, UCLA.[2] No support has been provided by either of the parties to this litigation.

The central issue in this case is whether government regulation of market processes will be expanded or contracted. The more particular question is whether the start which the

[1]This brief is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The written consents have been filed with the Clerk of the Court.

[2]The views expressed here are those of AAA and its members; they do not necessarily represent the view of the Regents of the University of California or UCLA.

Court made in *GTE Sylvania*[3] and in *Broadcast Music*[4] to base antitrust law on "demonstrable economic effect"[5] will proceed or be abandoned. AAA has an interest and an expertise in these issues. This brief addresses the economic issues in this case and the relationship between them and the relevant legal rules.

Summary of Argument.

This case raises again one of the most troublesome issues in antitrust: What principles determine the scope of the *per se* rule and the rule of reason. A second question, what kind of inquiry is to be conducted under the rule of reason when it applies, does not arise in this case because plaintiff proceeded below only on a *per se* theory.

This Court has made it increasingly clear that the purpose of antitrust law is to help maximize consumer welfare, *i.e.*, to help increase the productivity of our predominantly free market economy. To serve this purpose, the *per se* rule can properly be applied only to restrictive transactions which do not have any significant capacity to create efficiency.

This standard for the scope of the *per se* rule is based on demonstrable economic effect, as required by *Sylvania*. It is different from the standard that was applied in the vast majority of cases decided before *Sylvania*. The traditional standard is based primarily on form. That standard provides that certain forms of arrangements — price fixing, group boycotts and tie-ins — are illegal *per se*. The fact that some arrangements taking these forms can often produce significant efficiencies is irrelevant under the general statement of the rule. Legality depends on form rather than on effect.

A standard based on form, however, tends to come apart when it becomes clear that an arrangement which it makes

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[3]*Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[4]*Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

[5]*Sylvania*, 433 U.S. at 59.

illegal *per se* in fact creates significant efficiencies. Most courts are reluctant to strike down transactions that are obviously wealth producing. When confronted with an efficiency creating arrangement which the law holds to be illegal *per se*, many courts will try to find some way to avoid the rule.

This was true even before *Sylvania*, as the law of group boycotts, for example, makes clear.[6] This Court made broad statements that group boycotts were illegal *per se*; when lower courts confronted efficiency creating boycotts they often refused to apply the *per se* rule.[7] This has led to considerable confusion in that area of the law.

Sylvania complicated the problem even more when, announcing that departures from the rule of reason were to be based on demonstrable economic effect, it applied the rule of reason to certain distribution arrangements because they created efficiency. Many of the Court's prior decisions had applied the *per se* rule on the basis of a predominantly formal standard to arrangements that were designed precisely to create efficiencies of the type approved in *Sylvania*.[8] While *Sylvania* thus undercut many earlier decisions, none of this was mentioned in *Sylvania* itself.[9]

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[6]*See* W. Liebeler, *Antitrust Advisor* §1.32 (2d ed. Supp. 1982).

[7]The court in *Cullum Electric & Mechanical, Inc. v. Mechanical Contractors Assn.*, 436 F.Supp. 418 (D. S.C. 1976), *aff'd* 569 F.2d 821 (4th Cir. 1978), stated that "[d]espite the pronouncements of the Supreme Court, a multitude of lower courts have continued to evaluate alleged boycotts under a 'rule of reason' analysis rather than by the per se doctrine employed by the Supreme Court. . . . As one commentator has observed, 'the law in Washington, however, is quite different from the law in the rest of the country.' " 436 F.Supp. at 428.

[8]The three principal cases are *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959); *United States v. General Motors Corp.*, 384 U.S. 127 (1966); and *United States v. Sealy, Inc.*, 388 U.S. 350 (1967). The arrangements in all three cases appear to have been aimed at free rider problems similar if not identical to those involved in *Sylvania*. *See* R. Bork, *The Antitrust Paradox* 332 (1978); Liebeler, *Book Review*, 66 Cal. L. Rev. 1317 (1979), at 1325; Liebeler, *Intrabrand "Cartels" Under* GTE Sylvania, 30 UCLA L. Rev. 1 (1982), at 31 (hereinafter cited as Liebeler, *Intrabrand "Cartels"*).

[9]*See* Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1 (1977).

Lower courts were thus faced with two conflicting lines of authority. One was based on earlier cases like *Klor's*[10] and *Sealy*,[11] for example, which formalistically applied the *per se* rule to efficiency creating arrangements. The other was based on *Sylvania*, which applied an economic analysis to uphold restrictions because they created efficiency. Lower courts could decide cases like the one under review pretty much as they desired, just by choosing to follow the earlier cases, which *Sylvania* had not *explicitly* rejected, or to follow *Sylvania*. The former is exactly what the court below did.

There is a conflict between *Sylvania* and earlier cases like *Klor's, General Motors*[12] and *Sealy* which the Court must resolve before we can expect any consistency in the decisions below.

The foregoing explains why the law governing the scope of the *per se* rule and the rule of reason is as confused as it is. This confusion imposes significant costs on the economy. There is more litigation than need be and businessmen find it hard to plan their affairs to stay within the law. The condition of the law in this area as it now stands is highly unsatisfactory.

For these reasons the Court should take this opportunity to clarify the scope of the *per se* rule and the rule of reason. A general statement of the efficiency approach adopted in *Sylvania* and advanced in this brief would help the lower courts decide all kinds of cases brought under Section 1 of the Sherman Act. It would also help businessmen plan their affairs, and lawyers to advise them. Such a statement would continue the process begun in *Sylvania*; it could contribute significantly to the efficiency of both the legal and the market systems.

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[10] *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

[11] *United States v. Sealy, Inc.*, 388 U.S. 350 (1967).

[12] *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

When it comes specifically to restricted distribution systems, lower courts have confronted two principal problems in their attempts to apply the economic approach adopted in *Sylvania*. The first, and the main point on which the court below erred, is the distinction between "price" and "nonprice" restrictions. This characterization issue is crucial because of *Sylvania's* holding that the *per se* rule continued to apply to "price" arrangements, while "nonprice" restrictions were to be governed by the rule of reason. While the distinction seems simple, the discussion below will show that it is quite intractable. There are only two principled ways to deal with the distinction. It could be formally abandoned, as suggested by the Solicitor General.[13] Under this approach, the rule of reason would be explicitly applied to all distribution restrictions. Another approach, urged in this brief, would apply the characterization process described in *Broadcast Music* to determine which distribution restrictions constitute "*per se* price fixing." The *per se* rule would be applied to those restrictions; the rule of reason would be applied to all others.

The second principal problem is the distinction between vertical and horizontal arrangements. This characterization issue, too, is important because it determines the scope of the *per se* rule. *Sylvania* placed horizontal transactions under the *per se* rule and vertical "nonprice" agreements under the rule of reason. Attempts to make this vertical/horizontal distinction have led lower courts into a veritable jungle of formalistic line drawing.[14] The *Sylvania* standard itself is faulty here. A distinction based on the source of the arrangement is formalistic itself; the source of an arrangement, even if it could be determined without endless circumlo-

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[13] *See* Brief for the United States as *Amicus Curiae* in Support of Petitioner, *Monsanto Company v. Spray-Rite Service Corporation*, at 19.

[14] The clearest recognition of this is Judge Posner's opinion in *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742 (7th Cir. 1982).

cution, has no necessary relationship to its price and output effects. If the vertical/horizontal distinction is to persist in this area of the law, it must be based on something that bears some plausible relationship to economic effect.[15] A standard based on the source of an arrangement does not meet that test.

The court below applied the *per se* rule primarily because plaintiff alleged that its termination was part of a plan to fix resale prices.[16] If this is all it takes to turn a nonprice restriction into a price restriction, there is little left of *Sylvania*. For this reason the approach taken below cannot stand. Neither the cases nor the commentators, however, have yet articulated a principled way to distinguish between "price" and "nonprice" restrictions. The other briefs in this case have not dealt effectively with this problem either.[17] This brief will, accordingly, focus primarily on that problem.

Section I of the brief discusses the economic factors relevant to any inquiry under Section 1 of the Sherman Act. It briefly describes the nature of "consumer welfare," the maximization of which underlies modern antitrust policy.

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[15]It would be best to tie the definition of the two terms directly to the possible economic effects of an arrangement. Thus, Bork says: "The test is simply whether, assuming market power to exist, the agreement eliminating competition could lead to a restriction of output. If it could, the restriction is horizontal; if it could not, the restraint is vertical." Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 75 Yale L. J. 373 (1966), at 424 (hereinafter cited as Bork, *Rule of Reason*). One way to implement this insight is to equate vertical with intrabrand and horizontal with interbrand. *See* generally Liebeler, *Intrabrand "Cartels."*

[16]In its discussion of the boycott issue, however, particularly in footnote 4, the court below suggests that the *per se* rule would apply even in the absence of resale price fixing. *See* Section III below.

[17]The Brief for the United States as *Amicus Curiae* in this case suggests that the restrictions here should be regarded as "nonprice" because "Monsanto's marketing program on its face did not pertain to price." *Id.* at 15. This is basically a formalistic approach. Monsanto argues that the rule of reason should apply unless "non-price restrictions are designed or used to implement a scheme to control resale prices and prevent intrabrand price competition." Petitioner's Brief at 26. It is not clear how we distinguish such arrangments from those that "affect price or limit intrabrand price competition." *Id.* at 27.

It shows that under the consumer welfare standard the *per se* rule is properly applied only to trans.·-tions with a significant potential to restrict output and which lack a significant efficiency creating potential. The rule of reason comes into play if both output restricting and efficiency creating effects are present. The rule of reason inquiry itself involves a balancing of these two effects. This section also describes certain proxies that help the courts identify those transactions that have either an efficiency creating or an output restricting potential.

Section II of the brief shows that the "price"/"nonprice" distinction which *Sylvania* used to determine the scope of the *per se* rule is intractable as now articulated. The reason is that "nonprice" arrangements (governed by the rule of reason under *Sylvania*) adopted to alleviate free rider problems must affect price to accomplish that purpose; the *Socony-Vacuum* rule, however, makes all arrangements which have even an indirect affect on price illegal *per se*. This dilemma can be avoided by using the characterization process which the Court adopted in *Broadcast Music*. This section also deals with the current vitality of *Broadcast Music* despite its seeming limitation in *Maricopa*.[18] It is concluded that *Broadcast Music* provides the only principled way to determine the scope of the *per se* rule in this area of the law, short of overruling *Dr. Miles* and applying the rule of reason across the board.

Section III of the brief briefly discusses the alleged boycott which prevented plaintiff from obtaining additional supplies of Monsanto's products. It argues that the efficiency-based characterization approach adopted in *Broadcast Music* should be applied to group boycotts as well as to price fixing agreements. Section IV touches on the problem of concerted action, suggesting that the lack of a clear standard to de-

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[18]*Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982).

termine the scope of the *per se* rule has prompted some courts simply to find the absence of concerted action when they believe that the substantive behavior involved should not be an antitrust violation. The final section of the brief argues that a distinction between contract integration and ownership integration is formalistic; if demonstrable economic effect is to determine the scope of the *per se* rule, the legality of contract integrations should be determined by the same standards that are applied to mergers or to integration by internal expansion.

ARGUMENT.

I.

The Economic Determinants of the Scope of the Per Se Rule and the Rule of Reason and the Rule of Reason Inquiry.

The bedrock of market analysis is the voluntary exchange transaction. Two parties will enter such a transaction only if they both believe that they will benefit. The benefits which both parties gain from these transactions are called the gains from trade. Simply put, the purpose of an antitrust policy based on market considerations is to proscribe private arrangements that reduce the gains from trade available to the community as a whole.[19]

Private transactions can either increase or decrease the community's possible gains from trade. Transactions that increase those gains increase efficiency; those that decrease them reduce efficiency. From an antitrust standpoint, arrangements will generally not reduce efficiency unless they restrict output. Arrangements increase efficiency if they reduce the costs of productive marketing activity or produce more desirable products or services.

Some arrangements may have both output restricting and efficiency creating effects. The effect of such a transaction on net available gains from trade can only be determined by estimating the relative magnitude of those two opposing effects. If the gains from more efficient productive activity exceed the losses from a restriction of output, net gains from trade (consumer welfare or economic efficiency) will increase. Net gains from trade will decline if the opposite is true.

A voluntary exchange transaction, thus, can have three possible effects or combinations of effects that are relevant

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[19]The discussion of economic principles is taken from Liebeler, *Intrabrand "Cartels"* at 13. Supporting authorities are cited at that place.

to Sherman Act analysis.[20] The sole probable effect of some transactions will be to restrict output. Those transactions should be illegal *per se*. They can only reduce the total available gains from trade, thereby reducing economic efficiency and consumer welfare.

The sole probable effect of other transactions will be to increase efficiency. These transactions should not be subjects of concern to antitrust. They can only increase the total available gains from trade, thereby increasing economic efficiency and consumer welfare. These transactions should always be legal as far as the antitrust laws are concerned.

Still other transactions will have both of the above effects. They will have the potential both to increase efficiency and to restrict output. The rule of reason should be applied to these transactions and the inquiry under it should focus on the transactions' probable net effect. If the gains from trade available from increased efficiency seem likely to outweigh the losses from the output restriction effect, the transaction should be upheld. It should be struck down if the balance between these two factors appears to shift the other way. This is simply an economic statement of the legal formulation that the rule of reason inquiry is to balance the procompetitive effects of a transaction against its anticompetitive effects.

The crucial point for purposes of this case is that the rule of reason applies to any transaction that has a significant efficiency creating potential. It should also be remembered that a rule of reason inquiry is necessary only if there is a reasonable probability that the transaction will restrict output. The *per se* rule applies only to naked restraints of trade, *i.e.*, those that lack a significant efficiency creating poten-

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[20]This discussion is a verbal statement of the tradeoff model that Professor Williamson first developed to analyze the effects of horizontal mergers. *See* Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18 (1968); R. Bork. *The Antitrust Paradox* 107 (1978); Liebeler, *Intrabrand "Cartels"* at 16.

tial. It is not the form of the transaction that determines whether or not it is "naked." An arrangement is "naked," and therefore subject to the *per se* rule, only if it lacks an efficiency creating potential. A transaction should be legal without more if it does not have a significant output restricting potential; if both output restricting and efficiency creating effects are present the tradeoff analysis described above should be conducted under the rule of reason.

Since it is difficult to observe the effects of efficiency or market power directly, the law has developed a set of proxies to make the theoretical structure outlined above operational in a legal context. William Howard Taft formulated the classic proxy for efficiency creating potential in 1898 as part of the ancillary restrictions doctrine.[21] Taft's proxy required a contract with a main legitimate end which could be used to determine the scope of the permissible limitation on competition.[22] Professor (now Judge) Bork describes this proxy as "a contract integration (the coordination of other productive or distributive efforts of the parties)."[23] This Court recently described an efficiency creating arrangement for the blanket licensing of copyrights as an "integration of sales, monitoring, and enforcement against unauthorized copyright use."[24] The presence of this integration prompted the Court properly to refuse to apply the *per se* rule, even though the arrangement clearly involved horizontal price fixing.

The paradigm integration of productive facilities is the partnership. Mergers, too, are clearly within the pale. But once again, it is not the form which an integration takes that is important; economic effect is the paramount consid-

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[21]*United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd in pertinent part*, 175 U.S. 211 (1899).

[22]85 F. at 282.

[23]Bork, *Rule of Reason* at 474.

[24]*Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979) at 20.

eration. All arrangements between a supplier and its resellers, for example, involve an integration of productive facilities; their relationship is the economic equivalent of a partnership, embodying the efficiency-creating potential which Taft specifically recognized in his third example of an ancillary restraint in *Addyston Pipe & Steel.*[25] This "partnership" nature of the relationship between a supplier and its resellers should be enough in itself to remove all arrangements between them from the *per se* rule. The Court accepted this at least partially in *Sylvania* when it recognized the free rider problem and held that nonprice distribution arrangements should be governed by the rule of reason. We shall see below that the inability to make a principled distinction between "nonprice" and "price" restrictions provides an additional reason to extend this efficiency analysis to all arrangements between a supplier and its resellers in a restricted distribution system.

II.

The Distinction Between "Price" and "Nonprice" Distribution Restrictions Is Intractable: The Scope of the *Per Se* Rule and the Rule of Reason as Applied to Such Restrictions Can Only Be Determined by an Efficiency Standard.

Under *Sylvania* the rule of reason is applied to "nonprice" distribution restrictions; the *per se* rule continues to govern "price" restrictions. While it made the distinction between these two types of arrangements crucial, *Sylvania* itself did not address the difference between them. It was presumably thought that the distinction would not be dif-

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[25] "Again, when two men became partners in a business, although their union might reduce competition, this effect was only an incident to the main purpose of a union of their capital, enterprise, and energy to carry on a successful business, and one useful to the community. Restrictions in the articles of partnership upon the business activity of the members with a view of securing their entire effort in the common enterprise, were, of course, only ancillary to the main end of the union, and were to be encouraged." 85 F. at 280.

ficult to make. As subsequent lower court cases attempting to apply *Sylvania* have shown, however, that distinction is intractable.[26]

The difficulty arises because most "nonprice" distribution arrangements are designed to solve free rider problems. These problems typically arise when one dealer cuts prices below the level that covers the cost of providing point-of-sale services desired by the manufacturer. In this regard *Sylvania* said:

> Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. . . . Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's good will and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.[27]

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[26]Compare the decision below, for example, with *Bruce Drug, Inc. v. Hollister, Inc.*, 688 F.2d 853 (1st Cir. 1982), and *Davis-Watkins Co. v. Service Merchandise Co.*, 686 F.2d 1190 (6th Cir. 1982). In both of the latter two cases a termination and boycott after receiving complaints about price cutting were held not to be price related and, therefore, not subject to the *per se* rule. The decisions of the courts of appeals on this issue have been *ad hoc*; there is no principled basis on which the divergent decisions on the price/nonprice issue can be explained.

[27]433 U.S. at 54-55.

The reason that these services might not be provided by retailers, of course, is that price cutting by one or more dealers who fail to provide such services will prevent other dealers from recovering the costs of providing them. If they cannot recover their costs, they will not continue to provide the services, at least not at the optimal level.

It becomes clear, therefore, that free rider problems cannot be solved unless would-be free riders can be prevented from cutting prices. The so-called "nonprice" arrangements to which *Sylvania* applied the rule of reason must be able to prevent or control price cutting before they can be effective. "Nonprice" arrangements, therefore, have powerful effects in terms of stabilizing prices.[28] Tyler Baker makes this point as follows:

> Virtually all of the justifications for *Sylvania* assume an indirect effect on price. For example, the Court referred to "market imperfections such as the so-called 'free rider' effect" that might discourage retailers from providing the appropriate level of services. The same discounters that provide the price competition favored by the enforcement agencies may also "free ride" on the efforts of the authorized dealers. A "free rider" takes advantage of a competitor's investment and charges a price lower than the competitor's, thereby preventing the competitor from recouping its investment. The elimination of free riders may encourage investment, but it also may raise prices. For this reason a rule condemning all vertical restrictions having an

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[28]Both Petitioner and the United States as *Amicus Curiae* recognized the price effects of "nonprice" restrictions. *See* Petitioner's Brief at 26. The Solicitor General noted specifically that "many restrictions commonly regarded as nonprice vertical restrictions, including the location clause at issue in *Sylvania*, may have an upward effect on the resale price of the manufacturer's products." Brief for the United States as *Amicus Curiae* in Support of Petitioner at 16. Neither brief provides a satisfactory solution to the dilemma which they both recognize.

> indirect effect on price is flatly inconsistent with *Sylvania*.[29]

The conflict that arises between the price effects of "non-price" restrictions and the breadth of the traditional rule against price fixing can best be seen by quoting some recent language from a decision in the Fourth Circuit Court of Appeals discussing *Socony-Vacuum*:[30]

> [P]rice fixing is one of those practices that the Court has held to be illegal per se. . . . The Court stated [in *Socony*] "a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." To be guilty of price fixing, the conspirators do not have to adopt a rigid price, substantially less has been found to be price fixing. An activity can violate the per se rule even if its effect upon prices is indirect. . . . In essence, an interference with market forces freely setting the prices of goods is sufficient.[31]

The traditional expression of the *per se* rule devours "non-price" restrictions once we recognize, as we must, that the purpose and effect of "nonprice" arrangements is to affect prices. *Sylvania* and *Socony* are at war with each other; either *Socony* must be tempered in some way or *Sylvania* must give way. While a futile formalistic accommodation between *Socony's* flat prohibition of arrangements that affect prices and *Sylvania's* mandate to apply the rule of reason to "nonprice" restrictions could be made, *Sylvania* requires that this problem be solved in terms of demonstrable economic effect.

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[29]Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *A Way Out?* 67 Va. L. Rev. 1457 (1981) at 1467.

[30]*United States v. Socony-Vacuum Oil Co. Inc.*, 310 U.S. 150 (1940).

[31]*National Electrical Contractors Association, Inc. v. National Constructors Association*, 678 F.2d 492 (4th Cir. 1982) at 500.

That can be done by following the approach that the Court took in defining price fixing in *Broadcast Music*. There the Court refused to apply the *per se* rule to blanket copyright licenses issued by BMI, even though those licenses eliminated competition between individual copyrighted works and necessarily fixed prices. The Court said:

> To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services tney are literally "price fixing," but they are not *per se* in violation of the Sherman Act. . . . Thus it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always be a simple matter.[32]

In establishing a standard by which to "characterize the challenged conduct as falling within or without the category of behavior to which we apply the label '*per se* price fixing' " the Court wrote:

> More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on whether the effect, and here because it tends to show effect . . . the purpose of the practice is to threaten the proper

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[32]441 U.S. at 8-9.

> operation of our predominantly free market economy — that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more rather than less competitive." . . . The blanket license, as we see it, is not a "naked restraint of trade with no purpose except stifling of competition," . . . but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use.[33]

This language nicely brings together many of the points made in Section I of this brief. Justice White's language looks to output and competition restriction and efficiency creation as the principal determinants of the scope of the *per se* rule. A "naked" restraint is recognized as one which does not accompany an integration of productive facilities, which is used as a proxy for efficiency creating potential. Under the *Broadcast Music* approach, any arrangement that is not a "naked restraint of trade," *i.e.*, that has a significant efficiency creating potential, would fall outside the category of "*per se* price fixing."[34] Since there was an integration of productive facilities involved in Monsanto's distribution system, and since that integration had the potential to create significant efficiencies of the type contemplated in *Sylvania*, the *Broadcast Music* approach would apply the rule of reason in the present case.

There remains, however, the question of when the efficiency-based characterization process adopted in *Broadcast Music* comes into play and when the "literal" approach to characterizing *per se* price fixing is appropriate. *Broadcast Music* itself did not answer this question. The most obvious answer, of course, is that the efficiency-based process should

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[33]*Id.* at 19-20.

[34]The restriction on competition must, of course, also be ancillary to the efficiency creating integration, as it appears to be in this case.

apply to all price fixing cases and, indeed, to all other transactions challenged under Section 1 of the Sherman Act as well.

This would not be difficult. The basic question in each case after an output restricting potential appeared would be whether the arrangement was a naked restraint of trade, *i.e.*, without any significant efficiency creating potential. In most cases this question could be answered by inspecting the limitation on competition to see if it accompanied and was ancillary to an integration of productive facilities.[35] Appearance of this proxy for efficiency creating potential would signal the courts to move to the rule of reason inquiry or, at the very least, to a preliminary inquiry on the ancillarity issue.

If it were not for *Maricopa*, there would not be any reason to suppose that the *Broadcast Music* approach should not apply to all alleged price fixing agreements. In *Maricopa*, however, insisting that the Court had never wavered from the position that price fixing was illegal *per se*, Justice Stevens applied a literal *per se* approach to a system for delivering health care services that clearly produced significant cost savings. Justice Stevens relied heavily on *Socony* for the proposition that *all* price fixing arrangements are *per se* violations of Section 1 of the Sherman Act even though they may have, as was assumed on certiorari in *Maricopa*, "saved patients and insurers millions of dollars."[36] This position made it impossible for the majority to articulate a principled explanation of the Court's unanimous conclusion

[35]An integration of productive facilities will serve as an adequate proxy for efficiency creating potential most of the time. There may be some cases, however, where the efficiency creating potential is more subtle; it may be present even in the absence of an integration of productive facilities as that term is commonly understood. *See* Liebeler, *Book Review*, 66 Cal. L. Rev. 1317 (1979) at 1328-33. Most of the time, however, and certainly in this case, the integration of productive facilities will be a satisfactory proxy for efficiency creating potential.

[36]102 S. Ct. at 2472.

in *Broadcast Music* that the *per se* rule did not apply to the price fixing involved in the blanket copyright licenses granted by BMI and ASCAP. The majority could only indicate that the arrangement in *Maricopa* was "fundamentally different" from those in *Broadcast Music*, a position that the dissent found unsatisfactory.

The nature of the problem was clearly stated in Justice Powell's dissent:

> It is settled law that once an arrangement has been labeled as "price fixing" it is to be condemned *per se*. But it is equally well settled that this characterization is not to be applied as a talisman to every arrangement that involves a literal fixing of prices. Many lawful contracts, mergers, and partnerships fix prices. But our cases require a more discerning approach. The inquiry in an antitrust case is not simply one of "determining whether two or more potential competitors have literally 'fixed' a 'price.' . . . [Rather], it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often but not always, be a simple matter. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, *supra*, at 9.
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> Before characterizing an arrangement as a *per se* price fixing agreement meriting condemnation, a court should determine whether it is a "naked restrain[t] of trade with no purpose except stifling of competition." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 608 (1972), quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). See also *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49-50 (1977). Such a determination is necessary because "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing." *Id.*, at 58-59. As part of this inquiry, *a court must determine whether the procompetitive economies that the arrangement purport-*

edly makes possible are substantial and not realizable in the absence of such an agreement.[37]

The dissent concluded:

As in *Broadcast Music*, the plaintiff here has not yet discharged its burden of proving that respondents have entered a plainly anticompetitive combination without a substantial and procompetitive efficiency justification. In my view, the district court therefore correctly refused to grant the State's motion for summary judgment. This critical and disputed issue of fact remains unresolved.[38]

In the present case it is quite clear that plaintiff could not show that Monsanto's restricted distribution system did not have a substantial and procompetitive efficiency creating capacity. Absent such a showing, the *Broadcast Music* characterization approach would lead to the conclusion that Monsanto's conduct could not have constituted "*per se* price fixing."

Broadcast Music and *Maricopa* have not indicated when the *per se* rule should be applied literally and when the efficiency-based characterization process adopted in *Broadcast Music* must be undertaken. *Broadcast Music* provided little guidance on this issue; *Maricopa* compounded the confusion by applying a literal *per se* rule to an arrangement that quite clearly should have received the kind of analysis used in *Broadcast Music*. Our question, of course, is what are the implications of all this for using the efficiency-based characterization process to determine the scope of the *per se* rule in the context of distribution restrictions.

From a legal standpoint, the dilemma posed by the "price"/"nonprice" distinction advanced in *Sylvania* is a much more difficult problem than was involved either in *Broadcast Music* or in *Maricopa*. The arrangements in those

[37] *Id.* at 2482 (emphasis added).

[38] *Id.* at 2485.

cases either explicitly fixed prices (*Maricopa*) or were such that price fixing was a necessary effect of the arrangement (*Broadcast Music*). In either of those cases, therefore, the Court could have applied the literal *per se* rule without being out of line with the main body of traditional price fixing doctrine. No matter what one might think of such results from an economic perspective, the legal tools were at hand to decide those cases in a way that would not have been absurd when judged only by the standards of traditional legal doctrine.

This is not the case when it comes to dealing with the distinction between "price" and "nonprice" restrictions. As indicated above, it is simply impossible to make this distinction in a principled way by using a formalistic (legal) or literal approach. "Nonprice" restrictions clearly have the purpose and effect of reducing or eliminating price cutting by putative free riders; they thereby operate at least to stabilize prices. Under traditional doctrine any agreement with such a purpose and effect, whether vertical or horizontal, is a *per se* illegal price fixing agreement. If *Socony* is applied without qualification, as it was in *Maricopa*, the category of "nonprice" restrictions becomes an empty set.

This is not acceptable. *Sylvania* holds that there are such things as "nonprice" distribution arrangements. But the distinction between "price" and "nonprice" arrangements is impossible to make on the basis of traditional legal doctrine. The only way out of this dilemma — to find some principled way to qualify and limit *Socony* — is to maintain the efficiency-based characterization approach adopted in *Broadcast Music*. We need not discuss the general scope of *Broadcast Music* or discuss the correctness of *Maricopa* to reach this conclusion and decide this case. Necessity alone dictates applying *Broadcast Music* to the dilemma created by the distinction between "price" and "nonprice" distribution agreements.

Once this is done, the efficiency creating capacity of Monsanto's restricted distribution system makes the *per se* rule inapplicable. It becomes clear that the decision below must be reversed.

III.

The *Broadcast Music* Approach Should Also Be Applied to the Alleged Boycott: Since It Also Had Significant Capacity to Create Efficiency It Must Also Be Governed by the Rule of Reason.

The court below upheld a jury instruction that group boycotts were illegal *per se* and that it should find that Monsanto violated Section 1 of the Sherman Act if it found that Monsanto agreed with some of its distributors to terminate plaintiff's distributorship or limit plaintiff's access to Monsanto products. Monsanto argued that only horizontal boycotts were *per se* illegal and that vertically imposed boycotts were subject to the rule of reason. The court held, on the basis of *Klor's* and *General Motors*, that an agreement between Monsanto and some of its distributors to terminate plaintiff was *per se* illegal even if it was not part of a scheme to fix retail prices.[39]

The decision below is faulty even granting the continuing vitality of *Klor's* and *General Motors*. The court simply misstated the facts of *Klor's*;[40] *General Motors* was based on a horizontal agreement between the resellers, a factor not involved in the present case. For these reasons alone, the court below must be reversed on its boycott holding.

But this holding must also be reversed for all the reasons set forth in Section II above. The efficiency-based char-

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[39] 684 F.2d at 1235-36.

[40] The court below said that "[i]n *Klor's*, a manufacturer and several retail stores agreed to boycott a retail store that competed with some of the boycotters." *Id.* at 1236. *Klor's* actually involved an agreement between one retail store (Broadway-Hale) and several manufacturers under which the manufacturers agreed not to supply Klor's with certain items sold by The Broadway.

acterization process adopted in *Broadcast Music* is just as relevant to determining the scope of the *per se* rule as applied to group boycotts as it is to price fixing agreements. This approach has in fact been applied to group boycotts in an extremely able opinion by Judge Goldberg in the Fifth Circuit.[41] In dealing with a claim that certain restrictions on admission to a multiple listing service were *per se* illegal, he wrote:

> In light of the potency of the *per se* rule, however, the Supreme Court has recently reemphasized that the invocation of this conversation stopper must be limited to those situations which fairly fall within its rationale.[42]

After citing and discussing *Broadcast Music* and *Sylvania*, Judge Goldberg concluded:

> These and other recent cases make it clear that the legal characterization of a class of restraints requires "a judgment about [its] competitive significance" and that, in formulating that judgment, courts must pay heed to relevant "economic conceptions". . . .[43]

Since a multiple listing service carries with it a significant efficiency creating potential, the Fifth Circuit refused to apply the *per se* rule to the membership restrictions which that listing service had adopted. The efficiency creating capacity of restricted distribution systems strongly suggests that the same result should be reached here.

This conclusion is also supported by the fact that *Sylvania* sharply undercut the precedential value of *Klor's* and *General Motors*, the principal cases on which the court below relied in applying the *per se* rule to the alleged boycott in this case. The restrictions on competition in both of those cases seem to have been adopted to alleviate free rider problems similar to those involved in *Sylvania*. Indeed, it

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[41] *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980). *See* W. [illegible] r, *Antitrust Advisor* §1.32 (2d ed. Supp. 1982).

[42] 629 F.2d [illegible]

[43] *Ibid.*

would not be going too far to conclude that *Sylvania* clearly even if implicitly overruled both of those cases, each of which has been sharply criticized.[44] It is respectfully suggested that the Court take this opportunity to clarify the relationship between *Sylvania* and these earlier cases, affirming and extending the *Sylvania* approach.

For all of these reasons, the court below should be reversed on its group boycott holding.

IV.
The Problem of Concerted Action.

This brief does not discuss in detail the question whether complaints to a supplier by one reseller about another reseller's price cutting followed by the latter's termination is sufficient evidence to go to the jury on the issue of concerted action. It does, however, suggest that so much emphasis has been placed on this issue because the courts have not been able to develop coherent standards for applying the *per se* rule and the rule of reason or for applying the rule of reason itself once concerted action is found. It appears that a refusal to find concerted action many times represents a judgment that the substantive behavior involved should not be treated as an antitrust violation.[45]

The rigidities of the *per se* rule require safety valves for its avoidance in those cases where its application seems inappropriate. One of those safety valves, as we have seen,

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[44]*See Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Co.*, 682 F.2d 660 (7th Cir. 1982); Liebeler, *Book Review*, 66 Cal. L. Rev. 1317 (1979) at 1325; Liebeler, *Intrabrand "Cartels"* at 30; Posner, *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1 (1977) at 19-20.

[45]There is a tendency to fall back on *United States v. Colgate & Co.*, 250 U.S. 300 (1919), whenever the going gets tough in this area of the law. This tendency for *Colgate* "to distort the analysis in other, apparently unrelated, areas of antitrust law" has been remarked in Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is* Sylvania *A Way Out*?, 67 Va. L. Rev 1457 (1981) at 1471.

is the process of characterization: If all price fixing agreements are *per se* illegal, the courts will refuse to characterize useful price fixing arrangements as price fixing arrangements. Another safety valve appears in connection with the question of concerted action. If joint action that seems useful would constitute a *per se* violation, many courts will refuse to find joint action. The difficulties of predicting the outcomes of cases under such circumstances are plain; a legal regime like this is inefficient.

These safety valves from the pressures of the *per se* rule would not be necessary if we had a principled way to determine when the *per se* rule applied and when a transaction was governed by the rule of reason. The efficiency-based characterization process of *Broadcast Music* provides a principled way to deal with this problem. Its adoption would help to solve the largely formalistic problems raised by the concerted action issue.

V.

A Distinction Between Contract Integration and Ownership Integration Is Formalistic Line Drawing: If Monsanto Could Legally Own and Operate Its Own Resale Outlets, It Should Legally Be Able to Make Contracts With Its Resellers That Would Replicate the Economic Incidents of Ownership.

Sylvania held that the scope of the *per se* rule and the rule of reason should be determined by demonstrable economic effect, not by formalistic line drawing. That decision necessarily calls into question the double standard that has long applied more rigorous tests of legality to contract arrangements than to ownership arrangements. Why, for example, should the *per se* rule ever be applied to a contract between a supplier and its resellers determining the manner in which the resellers should handle the supplier's product, when it would never be applied to a merger between those parties or to the supplier's expansion into reselling by means of internal growth? There is no satisfactory answer to this

question in terms of demonstrable economic effect. The distinction is based on the formal differences between contract integration and ownership integration or on concern for the "freedom of traders," a concern that is not based on market considerations and which was explicitly rejected in *Sylvania*. After *Sylvania*, the same standards should be applied to contractual arrangements between a supplier and its resellers as would be applied to the acquisition of those resellers by the supplier, or to the supplier's integration into the resale level by means of expansion by growth. Under that standard the *per se* rule could not be applied in the present case, or indeed, in any other case involving restricted distribution arrangements.

This point was recently made by Judge Gee in an opinion of the Fifth Circuit Court of Appeals.[46] In upholding certain restrictions which Liquid Carbonic Corp. had placed by contract on its resellers, Judge Gee wrote:

> The final reason why we find the presumed reduction in intrabrand competition insufficient to constitute injury to competition is that, given the apparent nature of the market and Liquid's relative place in it, Liquid most probably could have chosen, consistent with the antitrust laws, to do all of its own distributing in the New Orleans area, either by cancelling its distributors and expanding internally or by simply acquiring the distributors themselves. If Liquid had thus vertically integrated into distribution, it clearly could have instructed its employees to abide by territorial and customer restrictions. And since Liquid could have accomplished these ends by either internal expansion or merger, either of which would have had an even greater impact on intrabrand competition, we fail to see why it would have been unreasonable for Liquid to accomplish the same ends by contract.[47]

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[46] *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001 (5th Cir. 1981).

[47] *Id.* at 1006.

This conclusion is consistent with the economic analysis of the scope of the *per se* rule and the rule of reason set forth above. It provides still another reason why the judgment below should be reversed.

Conclusion.

The Court should reverse the judgment of the court below. That can be done most consistently both with the prior decisions of this Court and with the principles of demonstrable economic effect by applying the efficiency-based characterization process adopted in *Broadcast Music* to the problem of determining the scope of the *per se* rule and the rule of reason in restricted distribution cases. The same approach should be applied to the boycott issue, as discussed above.

Dated: June 20, 1983.

Respectfully submitted,

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APPENDIX A.

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*The foregoing brief was drafted by counsel. It has been reviewed by each of the persons listed above. Each of them agrees generally with the statements made in the brief even though some of them might have expressed particular points in somewhat different form than they were actually expressed by counsel.

No. 82-914

IN THE
Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,
Petitioner,
v.
SPRAY-RITE SERVICE CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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BRIEF OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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STATEMENT OF INTEREST OF THE ASSOCIATION OF GENERAL MERCHANDISE CHAINS, INC.

The Association of General Merchandise Chains, Inc. ("AGMC") submits this brief *amicus curiae*[1] in support of respondent Spray-Rite Service Corporation and urges that this Court not re-examine or modify the long-standing *per se* prohibition against vertical price fixing established by *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911). This issue, which was addressed neither by the court

[1] This brief *amicus curiae* is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. Letters containing the consent of the parties have been filed with the Clerk of the Court.

below nor by Monsanto in its Petition for Certiorari or Brief, has been injected into this case by the United States Department of Justice as *amicus curiae*.[2] For the reasons discussed below, this Court need not and should not question in this case the continued *per se* treatment of vertical price fixing. If the Court nonetheless decides to address this issue now, it should reaffirm the prohibition that has, for over 70 years, safeguarded effective price competition, and thereby contributed greatly to lower consumer prices and economic efficiency.

AGMC represents the nation's discount and variety general merchandise retail industry. A primary sales strategy of the retail stores comprising this industry is vigorous price competition. AGMC's membership includes retailers that operate more than 20,000 discount, variety, dollar, junior department, family center, off-price, factory outlet and other general merchandise stores. Its members range widely in size and include many of the nation's largest retail chains as well as companies active in one or more regions of the country and those with only a few locations, or even a single store. AGMC member company stores are located in all 50 states and account for over $40 billion in sales. AGMC believes that the position expressed in this brief not only reflects the views of its members but is also consistent with the publicly expressed views of other organizations representing retailers that engage in vigorous price competition.[3]

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[2] In its brief *amicus curiae* supporting Monsanto's petition for *certiorari*, the Department of Justice asserted that "the Court should grant review in this case to consider whether *all* vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason." Brief for the United States as Amicus Curiae ("Amicus Petition") at 13 (emphasis in original). The House Committee on the Judiciary has termed "particularly disturbing" the fact that, through its *amicus* intervention in the instant case, the Department of Justice "sidestepped the narrower questions raised by the parties." H.R. Rep. No. 98-181, 98th Cong., 1st Sess. 22 (1983).

[3] *See Impact of Federal Antitrust Enforcement Policies on Small Business: Hearing Before the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Committee on Small Business*, 97th Cong., 2d Sess. 9 (1982) (Testimony of Jared O. Blum, Vice

The change in treatment of vertical price fixing sought by the Department of Justice threatens the viability of AGMC's members and of thousands of other retailers that depend on continued ability to offer products at competitive prices. By subjecting these distributors to the price control of manufacturers, the Department's proposed legal rule would deprive them of their fundamental business strategy of achieving high sales volumes through competitive pricing. Future entry by price-competitive retail enterprises into the market would be severely impeded. Consumers would pay higher prices as a result of this limitation on retail competition, and severe injury would inevitably result to a highly efficient, innovative form of distribution.

SUMMARY OF ARGUMENT

This Court ought not address whether vertical price fixing has properly been treated as *per se* illegal under the antitrust laws. Monsanto has raised threshold questions which can be addressed without undermining the *per se* illegality of vertical price fixing. The prohibition against vertical price fixing has shaped the way that products have been distributed for almost three-quarters of a century. Such a disruptive change in economic policy, if made at all, should be effected by Congress and not the Court, notwithstanding the judicial genesis of the principle. Congress is better able thoroughly to evaluate the ramifications of the change urged by the Department of Justice. In fact, after having conducted such an evaluation in 1975, Congress determined that vertical price fixing should not be permitted and invalidated state "fair trade" statutes that had allowed manufacturers to set retail prices. Moreover, this case provides a particularly inappropriate vehicle for a re-

Chairman, Small Business Legislative Council); *id.* at 366 (Testimony of James D. "Mike" McKevitt, Director of Federal Legislation, National Federation of Independent Business). Mr. McKevitt testified that a survey conducted in August, 1982 by the National Federation of Independent Business of its 505,000 members revealed that 73 percent opposed legalization of resale price maintenance.

evaluation of the illegality of vertical price fixing because of the presence of other issues, the lack of an adequate description of the vertical price-fixing arrangement, and the absence of any significant attention directed to the price-fixing issue either by the parties or by the appellate court.

If the Court does decide to address the issue suggested by the Department of Justice, it should strongly reaffirm the *per se* illegality of vertical price fixing. Vertical price fixing is destructive of both intrabrand and interbrand competition. Not only does vertical price fixing eliminate price competition among resellers of the same product, but it is a particularly effective mechanism for facilitating horizontal price-fixing conspiracies. A manufacturer's interest in promoting interbrand competition can be realized through nonprice means that preserve the opportunity for intrabrand price competition.

ARGUMENT

I. The Record Supports The Seventh Circuit's Conclusion That A Price-Fixing Conspiracy Had Been Proven

Monsanto's argument for reversal of the Seventh Circuit is based on its objection to the evidence from which an inference of a vertical price-fixing conspiracy can be drawn. It contends in its Petition for Certiorari[4] and in its Brief[5] that a conflict exists among the circuits with respect to the evidence needed to support an inference of concerted action involving a terminated dealer's former supplier and competitors.

In *Spray-Rite Service Corp.* v. *Monsanto Co.*, 684 F.2d 1226, 1239-40 (7th Cir. 1982), the Seventh Circuit determined upon a review of the record that "[t]here was sufficient evidence to support the jury's verdict that Monsanto terminated

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[4] Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit at 20-28. *See also* Amicus Petition at 6-10.

[5] Brief of Petitioner Monsanto Company at 32-37. *See also* Brief for the United States as Amicus Curiae in Support of Petitioner ("United States Brief") at 7-12.

Spray-Rite pursuant to a conspiracy with other distributors to fix the resale price of Monsanto herbicides." The court had before it the jury's affirmative finding that there had been such a conspiracy, *id.* at 1233, and it identified the evidence on which this finding could have been based. *Id.* at 1239. Moreover, the court below termed Monsanto's reliance on *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*,[6] to be "misplaced" because, in that case, "[t]he only evidence of a conspiracy to fix resale prices was evidence of a price complaint from one distributor. . . . In this case, however, we have evidence of many complaints coupled with evidence refuting Monsanto's independent business reason for terminating Spray-Rite."[7]

As set forth exhaustively in Spray-Rite's Brief,[8] the record amply supports the jury's determination and the Seventh Circuit's affirmance thereof. In light of this abundance of evidence, this Court is not presented with the issue of the minimum amount of evidence needed to support an inference of conspiracy in a dealer termination case. Rather, because the evidence here would meet virtually any reasonable test, the Court need not delineate the level of evidence below which an inference of conspiracy cannot be supported.

Nonetheless, some have urged the Court to use this case as a vehicle to impose rigid standards for evaluating the sufficiency of the evidence. These standards would make recovery by a terminated dealer virtually impossible, because they would require the dealer either to negate all other possible causes of termination or to present evidence that, at best, is virtually unobtainable. For example, the National Agricultural Chemicals Association would require a terminated dealer who cannot prove total compliance with a seller's nonprice restraints to present, as a "minimum," "solid evidence" that: (1) other dealers had also not complied with nonprice restraints; (2) other

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[6] 662 F.2d 935 (2d Cir. 1981), *cert denied*, 103 S.Ct. 176 (1982).

[7] 684 F.2d at 1239 n.8.

[8] Brief of Respondent Spray-Rite Service Corporation.

dealers' noncompliance was similar to that of the terminated dealer; (3) other noncomplying dealers had not engaged in price-cutting; (4) the manufacturer had knowledge of their noncompliance but did not terminate them; and (5) there was no other reason why the dealer might have been terminated.[9] To make this showing, a plaintiff would have to obtain extensive information about the behavior not only of the manufacturer but also of a large number of dealers with respect to price and nonprice matters, ascertain the state of the manufacturer's knowledge about the dealers' behavior, and establish the particulars of the course of dealings among them over what might well be an extended period. Much of this information could, under the best of circumstances, be obtained only with the greatest of difficulty and at considerable expense; in most instances, the information would not be available at all. Hence, this proposed standard would effectively preclude any recovery by a dealer terminated because of a vertical price-fixing conspiracy.

Monsanto also argues that the Seventh Circuit improperly permitted a *per se* rule to be applied to nonprice dealer restraints imposed by Monsanto. According to the Seventh Circuit, "the [trial] court instructed the jury that Monsanto's otherwise lawful compensation programs and shipping policies were *per se* unlawful if undertaken as part of an illegal scheme to fix prices." 684 F.2d at 1237. On appeal, the Seventh Circuit addressed whether the jury had been correctly instructed to apply the *per se* rule to the vertical nonprice restraints on the basis of *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967), or whether, as a result of *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977), the legality of these vertical nonprice restraints should have been determined using a rule-of-reason analysis. The Seventh Circuit stated that the *per se* standard was proper, as the rule-of-reason approach "applies only if there is no allegation that the territorial restrictions are

[9] Brief Amicus Curiae of National Agricultural Chemicals Association in Support of Reversal at 9.

part of a conspiracy to fix prices." 684 F.2d at 1237. The Seventh Circuit's use of the word "allegation" is inappropriate but harmless in light of the fact that the jury responded "yes" to the special interrogatory: "Were the compensation programs and/or areas of primary responsibility, and/or shipping policy created by Monsanto pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides?" 684 F.2d at 1233. Thus, the jury found there was not merely an allegation but the existence of a vertical price-fixing conspiracy. In light of the evidence of record that clearly supports the jury's determination and the Seventh Circuit's affirmance, this Court should not adopt an evidentiary standard that in reality precludes a dealer terminated pursuant to a vertical price-fixing agreement from recovery by making it virtually impossible for him to prove the existence of a conspiracy. For the reasons discussed below, AGMC firmly opposes any modification of the *per se* prohibition against vertical price fixing. It is equally opposed to any evidentiary standard, such as discussed above, that would have the same practical effect as modifying or overturning the *per se* rule.

II. The Long-Established Prohibition On Vertical Price Fixing Should Not Be Reconsidered Or Modified In This Case

In *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 404-09 (1911), the Court held that vertical price fixing imposes a *per se* unreasonable restraint on trade and is illegal without examination of the underlying economic circumstances or asserted justifications. In an unbroken series of decisions during the intervening years,[10] this Court has con-

[10] *E.g.*, Rice v. Norman Williams Co., 102 S.Ct. 3294 (1982); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980); Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977); United States v. Parke, Davis & Co., 362 U.S. 29 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944); United States v. A. Schrader's Son, Inc., 252 U.S. 85 (1920); United States v. Colgate & Co., 250 U.S. 300 (1919). *Cf.* Albrecht v. Herald Co., 390 U.S. 145 (1968); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951).

sistently maintained this position. The long-established absolute prohibition against vertical price fixing, which has shaped the competitive structure for the distribution of goods in the United States, should be changed, if at all, only by Congress and not by the courts.

Refusal to reconsider or modify the *per se* prohibition of vertical price fixing would be consistent with the Court's recent observation that, "[o]nce established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials."[11] As a result of the absolute prohibition against vertical price-fixing agreements, sellers have been aware of the limits on their power with respect to their customers' pricing decisions. Buyers have understood that, if they suffer harm as a result of resisting a manufacturer's attempts to fix resale prices, they have potent legal remedies available that make their opposition to illegal action economically feasible, while if they join in a price-fixing scheme they risk civil and criminal penalties. By clearly delineating the permissible from the impermissible, the Court has made it possible for business entities at all levels of distribution to go about their business with an understanding of what is and what is not legal.

A. Any Modification Of The *Per Se* Prohibition Against Vertical Price Fixing Should Be Made By Congress And Not The Court, And Congress Has Already Endorsed This Prohibition

If a change is to be made in the treatment of vertical price fixing, and AGMC does not believe it should, it should be made legislatively. Congress is in a much better position than this

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[11] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 n.16 (1977). While the Court noted that these "advantages are not sufficient in themselves to justify the creation of *per se* rules," *id.*, those advantages coupled with other reasons for continuing to prohibit vertical price fixing amply justify continued *per se* treatment.

Court comprehensively to weigh all the economic, political and social benefits that result from maintaining the current prohibition or modifying it.[12]

This Court recently recognized the appropriate role of Congress in making changes in the *per se* treatment of certain types of behavior when it stated:

> Our adherence to the *per se* rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the *per se* rule in this case therefore are better directed to the legislature.[13]

Accordingly, the Court "declined the . . . invitation to cut back on the *per se* rule against price fixing." *Id.* at 2479.

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[12] *Cf.* Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories, 103 S.Ct. 1011, 1023 (1983) ("It is 'not for this Court to indulge in the business of policy-making in the field of antitrust legislation. . . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.' "), *citing* United States v. Cooper Corp., 312 U.S. 600, 606 (1941).

[13] Arizona v. Maricopa County Medical Society, 102 S.Ct. 2466, 2478-79 (1982) (citation omitted). The Court's wisdom in recognizing that changes in *per se* treatment might more appropriately be made legislatively rather than judicially is supported by recent experiences regarding changes in *per se* treatment of other vertical restraints. In White Motor Co. v. United States, 372 U.S. 253 (1963), the Court held that it lacked sufficient information to determine whether the legal standard for judging vertical restraints should be changed. *Id.* at 263. In United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), the Court nonetheless effected a change by accepting the United States' invitation to treat vertical nonprice restraints as *per se* unreasonable. Based on experience over the ensuing decade, the Court in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), found it necessary to repudiate the "abrupt and largely unexplained departure" effected by *Schwinn*, *id.* at 47, and return to the treatment long accorded vertical nonprice restraints.

The Court similarly should decline the Department of Justice's invitation to modify the *per se* prohibition of vertical price fixing in this case, and instead leave this issue to Congress. The Court would thereby be faithful to the distinct roles of the Judiciary and the Congress, consistent with this Court's teachings and the recently expressed position of many in Congress. Numerous members of the Senate and the House of Representatives and attorneys general of most states have urged the Court to defer to Congress on this issue.[14] The House Committee on the Judiciary recently expressed its dissatisfaction with the Department of Justice's attempt to have the Court rather than the Congress re-evaluate vertical price fixing:

> At the very least, this expansive use of certiorari to accomplish a sweeping revision of the law relating to the RPM [Resale Price Maintenance] indicates an insensitivity to the respective roles of the Congress and the Judiciary in the formulation and application of antitrust policy. More seriously, the Department's conduct in this private matter may prove to be a wholly unjustified allocation of resources in a bold attempt to circumvent the Congress.[15]

Similarly, a joint resolution sponsored by forty-seven Senators directs that, "[t]o the extent that the Attorney General or other Federal officials shall deem it necessary to change the law prohibiting vertical price restraints, such officials shall forward proposed legislation embodying such changes to Congress for proper consideration."[16] Moreover, the House Committees on the Judiciary and on Appropriations have each voted to cut off all funding for Department of Justice efforts in Fiscal Year 1984 to modify the *per se* prohibition on vertical price fixing. The Judiciary Committee explained that this action was "the Committee's missive that it will not tolerate

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[14] *See generally* Brief for the Undersigned Senators and Representatives as Amicus Curiae; *see also* Brief for the Thirty-Nine States as Amicus Curiae.

[15] H.R. Rep. No. 98-181, 98th Cong., 1st Sess. 22 (1983).

[16] S.J. Res. 105, 98th Cong., 1st Sess. (1983).

change in the carefully crafted, and congressionally-approved, antitrust policy concerning retail price-fixing without the consent of the people's elected representatives."[17]

In fact, Congress has approved the *per se* treatment that this Court has held should be used in connection with vertical price restraints. This approval was indicated by Congress' acquiescence over a long period of time with respect to this treatment. More significantly, approval was affirmatively demonstrated by Congress' repeal of antitrust immunity for firms acting under state "fair trade" statutes.[18] As this Court recognized, "Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51 n.18 (1977). The Court should not change a rule of law that has been legislatively approved by both silent acquiescence and affirmative ratification and should not adopt a position that is inconsistent with the will of Congress.

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[17] H.R. Rep. No. 98-181, 98th Cong., 1st Sess. 22 (1983). *See also Impact of Federal Antitrust Enforcement Policies on Small Business: Hearing before the Subcommittee on Antitrust and Restraint of Trade Activities Affecting Small Business of the House Committee on Small Business*, 97th Cong., 2d Sess. (1982); *Federal Antitrust Enforcement and Small Business: Joint Hearing Before the Senate Committee on Small Business and the Subcommittee on State, Justice, Commerce, the Judiciary, and Related Agencies of the Senate Committee on Appropriations*, 97th Cong., 2d Sess. (1982).

[18] The Consumer Goods Pricing Act, 89 Stat. 801 (1975), *amending* 15 U.S.C. §§ 1, 45(a), was passed with unanimous consent by the Senate, 121 Cong. Rec. S20874 (Dec. 2, 1975) and was overwhelmingly approved, by a vote of 380 to 11, by the House of Representatives, 121 Cong. Rec. H7104 (July 21, 1975). The Brief for the Undersigned Senators and Representatives as Amicus Curiae, filed in this case, contains a detailed discussion of the legislative history of this repeal and the views of Congress regarding vertical price fixing.

B. If This Court Re-Examines The Standard For Assessing The Illegality Of Vertical Price-Fixing Agreements, It Should Again Rule That They Are *Per Se* Illegal

Vertical price-fixing agreements properly fall within the category of *per se* illegality "because of their pernicious effect on competition and lack of any redeeming virtue." *Cf. Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 5 (1958). Such agreements lessen interbrand and intrabrand competition and, moreover, do not contribute to the attainment of any economically acceptable goal. On the contrary, these restraints impede the efficient operation of a competitive marketplace. As one commentator has recently observed: "[C]ontrary to the Bork-Posner model, vertical restraints are the result not the cause of increased distributional efficiency! They represent a desperate counterattack on the part of the besieged, less efficient elements in the trade to stem or roll back the rising tide of distributional productivity."[19]

1. Resale Price Maintenance Would Destroy Effective, Pro-Consumer Intrabrand Competition

Manufacturers' resale price maintenance programs would constitute the most decisive vehicle for eliminating all intraband competition, especially if coupled with a nonprice restraint program. Resale price maintenance agreements strike directly at the fundamental competitive strategy used by price-competitive retailers, who offer consumers an alternative to higher-priced distributors. The lower-priced option offered by some retailers, including AGMC members, assures that consumers retain the freedom to choose whether they value the combination of image, convenience, promotion and service offered by higher-priced distributors more than they value the combination of those factors, together with a strong price emphasis, provided by price-competitors. In the absence of resale price maintenance, market dynamics can determine

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[19] Steiner, *Vertical Restraints and Economic Efficiency*, Working Paper No. 66 at p. 18, Bureau of Economics, Federal Trade Commission (1982).

which type of distribution will be most attractive to consumers and thus will maximize product sales. The continuance of intra-brand price competition assures, moreover, that the factor of price, referred to as "the central nervous system of the economy,"[20] will be available as a clear reference point whereby consumers may readily make and register their decisions on the value offered them by competing distributors.

In addition, the *per se* rule against resale price maintenance encourages the development and growth of innovative forms of retail competition. Department, variety, and discount stores are only a few of the competitive formats which have emerged in past years, and catalog, outlet, and off-price stores are some of the more recent examples of innovative retail enterprises. Many of these originate as small business enterprises and would be blocked at the entry threshold, unless given the chance to demonstrate that they can operate efficiently. Foreclosing these retailers from competing in price using manufacturers' leading brands effectively chokes off their business opportunities.

Thus, existing law and economic efficiency both militate in favor of consumers being afforded the widest choice of retail mix in shopping for a manufacturer's product, with the opportunity assured to choose on the basis of price or any other factor of importance to the consumer. Retailers representing all types of competitive strategy, including those emphasizing nonprice considerations, have been successful under current law, and the distribution system has been effective. This point is forcefully made by Professor Lawrence Sullivan:

> [T]he cost and revenue functions of the neighborhood store, the outlet in a local shopping center, in a regional center, or in the urban department store will differ markedly. If these outlets are left to price for themselves, there will tend to be price variations too. To the extent consumers value the convenience and service of the local market, that outlet will be able to price at a level covering

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[20] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

> its higher costs, even though higher volume, more efficient outlets charge less. Any single price the manufacturer may set will inevitably distort those fine variations which the market can make and will tend to hold the more efficient outlets, which would price at the lowest level, to a price at or near that which will be charged by the least efficient. The latter will no longer have to justify in added convenience the additional price they charge.
>
> To vault from the recognition that the manufacturer would tax its own long range interests were it to set a minimum resale price which restricted output at the dealer level to the conviction that the manufacturer, better than the market, had grasped and penetrated the myriad data and come up with precisely that figure which—even though expressed as a minimum price, not a maximum one—would assure the highest output at the dealer level, is to engage in the most fanciful non-sequitur. Business firms frequently make decisions that are adverse to their own best interest; there is no economic law against it. The only economic law of relevance is that which says that if competitive conditions are maintained, the market will tend to select out for favor those firms which make the best decisions.[21]

A faulty premise underlies the argument that a *per se* rule is no longer warranted since intrabrand competition can be stifled just as effectively by nonprice vertical restraints as by resale price fixing. Affording rule-of-reason treatment to resale price fixing would enable a manufacturer to combine both price and nonprice restraints and thereby totally eliminate intrabrand competition. The propriety of such a combination is, in fact, asserted in the *amicus curiae* brief of National Agricultural Chemicals Association at 15-23. In part because nonprice vertical restraints are subject to the rule of reason, it is particularly important to retain the *per se* prohibition

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[21] L. Sullivan, *Antitrust* at 381-82 (1977). In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951), the Court held that vertical price-fixing agreements, whether they set maximum or minimum prices, "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

against vertical price fixing, thereby preserving the possibility that some effective intrabrand competition will exist.

Resale price maintenance constitutes, by definition, an absolute preclusion of retail price competition in a manufacturer's product, whereas such competition is virtually always present within a nonprice restrictive framework. Even if the manufacturer undertakes to implement a system whereby retailers are confined to the territories in which they operate, there will always be opportunity for competition at the fringes. Even though retailers may be confined, assuming a restraint is reasonable, consumers cannot be prevented from travelling to price-competitive retailers. In addition, fixed resale prices make it much easier to detect, and thereby deter, any efforts by distributors to generate intrabrand competition.

Since it is highly unlikely that many manufacturers will employ airtight nonprice vertical restraints, opportunities for widespread price competition exist. Nonprice restraints are not *per se* lawful, but must be tested under the rule of reason involving an assessment of the character and purpose of the restraint.[22] If the restraint is more confining than justified by the objective, then the manufacturer's program is in jeopardy. Accordingly, a manufacturer's caution in designing a program to increase the likelihood of its passing muster under a rule-of-reason analysis enlarges the opportunities for intrabrand price competition. By definition, no latitude for any intrabrand price competition would exist under a resale price maintenance scheme.

Finally, experience has shown that permitting vertical price-fixing agreements threatens the continued survival of many small retailers. The Congressional Research Service, for example, performed a statistical analysis of business failures in 1972 that led to the conclusion that the rate of business failures in states with fully effective "fair trade" laws was 55 percent

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[22] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

greater than in free trade states.[23] Another Congressional Research Service analysis indicated that retail stores of all sizes in "free trade" states experienced, during the period 1956-1972, a 32 percent greater growth rate than did similar stores in "fair trade" states.[24]

2. Rule-Of-Reason Treatment Of Vertical Price Fixing Will Facilitate Elimination Of Interbrand Competition

A principal basis for the Court's decision in *GTE Sylvania* to treat vertical price and nonprice restraints differently was the Court's acknowledgment that "resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands."[25] In fact, from the beginning this Court has recognized the debilitating effect that vertical price fixing has on interbrand competition,[26] and it has recently reaffirmed the continuing validity of this determination.[27] A modification of the *per se* treatment accorded vertical price fixing, with the

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[23] *Fair Trade: Hearings on S. 408 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 94th Cong., 1st Sess. 333 (1975) ("*1975 Senate Hearings*") (Statement of Howard Useem, Economic Analyst, Economics Division, Library of Congress Congressional Research Service); *see also* Lee, *The Impact of Fair Trade Laws on Retailing*, 41 J. Retailing 1 (Spring 1965).

[24] *1975 Senate Hearings* at 333 (Statement of Howard Useem, Economic Analyst, Economics Division, Library of Congress Congressional Research Service).

[25] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n.18 (1977) (original emphasis), *citing* White Motor Co. v. United States, 372 U.S. 253, 268 (1963) (Brennan, J. concurring).

[26] *See* Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911) (a manufacturer imposing resale prices "can fare no better with its plan of identical contracts than could the dealers themselves if they formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.").

[27] *See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980).

resultant decrease in both intrabrand and interbrand competition, would be inconsistent with *Continental T.V., Inc.* v. *GTE Sylvania Inc.* It would also be inconsistent with the pro-consumer orientation of the antitrust laws.[28]

Even some of the leading commentators who advocate substituting a rule-of-reason analysis for *per se* treatment of vertical price fixing acknowledge that vertical price-fixing agreements provide a convenient mechanism for horizontal price fixing.[29] This danger is also tacitly recognized by the Department of Justice's concession that vertical price fixing would be unlawful where the economic conditions in the marketplace are such that vertical price fixing would facilitate horizontal price rigidity or a reduction in horizontal price competition.[30]

The establishment of identical, or minimum, resale prices for all the seller's customers in an area presents a precise and convenient reference point for competitors of both the seller and the buyer. It announces the seller's policy of eliminating price competition at the distribution level and signals the exact price at which competition will cease. By adopting a resale maintenance program, a manufacturer notifies his competitors that it is not likely to seek expanded distribution by reducing the price of its goods to its retailers in the hope that they will pass on reductions to consumers. The devices used by the seller to communicate his designated resale price—price announcements, price lists, distributor and retail mailings—are

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[28] *See, e.g.*, Reiter v. Sonotone Corp., 442 U.S. 330, 342 (1979) ("It is in the sound commercial interests of the retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive private enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market.").

[29] *See, e.g.*, R. Bork, *The Antitrust Paradox* 292-95 (1978); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 294 (1975).

[30] Brief for the United States as Amicus Curiae in Support of Petitioner at 24 n.34 ("United States Brief").

very nearly as much an open invitation to competitors as an instruction to customers. Thus, as long as sellers are not prohibited from entering into vertical price-fixing agreements, they can use these agreements to communicate with their competitors and invite them to engage in similar price practices. Nonprice vertical restraints, in contrast, do not offer tools for such communication among competitors.

Vertical price fixing also has the effect of stabilizing horizontal price-fixing agreements. As one commentator has observed:

> If suppliers choose to shave the cartel price in order to increase volume, they can offer open or secret discounts to dealers with some expectation that the discounts can be passed along to consumers. Industry-wide resale price maintenance would make open dealer price-cutting impossible, and would thus diminish the incentives for supplier price-cutting and thereby assist in stabilizing the cartel.[31]

Participants in a horizontal price-fixing arrangement can more easily police adherence to their illegal scheme when a clearly ascertainable reference point is available. Using third parties such as distributors and brokers to monitor vertically imposed prices, horizontal price fixers at the manufacturer level quickly learn of deviations from their illegal agreements and can act to bring the price-cutting participant back into line. This Court has recognized the pro-competitive benefits when participants in price-fixing arrangements undercut the fixed price, and has condemned mechanisms facilitating detection of behavior that destabilizes price-fixing cartels.[32]

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[31] Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restraints*, 78 Colum. L. Rev. 1, 15-16 (1978), *citing* Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger, and Potential Competition Decisions*, 75 Colum. L. Rev. 282, 294 (1975), and Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 97 (1960).

[32] *See, e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29, 43-48 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441, 456 (1922).

Resale price maintenance also eliminates the downward pressure from retailers on wholesale prices that can disrupt horizontal price-fixing cartels.[33] Many retailers pursue a strategy of aggressive pricing, in which they accept a low markup per sale but compensate by doing a large volume of business. Individual price-competitive retailers successful with this mode of selling are able to exert pressure on their suppliers to lower wholesale prices and can thereby further reduce retail prices. Rivals of these price-competitive retailers also independently seek reduced wholesale costs from the same manufacturer or manufacturers of competing brands in order to contend for retail sales. The overall impact is to dislodge manufacturers' interdependent pricing parallelism.

A massive volume of testimony and economic data was presented to Congress in 1975 when it considered and repealed the legislation which permitted the states to adopt "fair trade" statutes. This evidence corroborates the hypothesis that vertical price fixing abets either express or tacit collusion at the horizontal level. This material demonstrates the actual, harmful consequences of legalized vertical price fixing on consumer prices and on small business.[34] Among the major proponents of repeal of the "fair trade" statutes was the Department of Justice, which provided Congress with the results of surveys that measured the impact of resale price maintenance on consumer prices. A 1956 Department of Justice survey of products sold both in "fair trade" and in "free trade" jurisdictions disclosed that consumer prices for "fair traded" goods ranged

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[33] *See generally* Gerhart, *The "Competitive Advantages" Explanation for Intrabrand Restraints*, 1981 Duke L.J. 417.

[34] *See generally Fair Trade: Hearings on S. 408 Before the Subcommittee on Antitrust and Monopoly of the Senate Judiciary Committee*, 94th Cong., 1st Sess. (1975) ("*1975 Senate Hearings*"); *Fair Trade: Hearings on H.R. 2384 Before the Subcommittee on Monopolies and Commercial Law of the House Judiciary Committee*, 94th Cong., 1st Sess. (1975) ("*1975 House Hearings*").

from 19 to 27 percent higher in the "fair trade" states.[35] A 1970 survey compared the prices of "fair traded" items in discount and department stores in "free trade" states during the week of June 26, 1970 with their "fair trade" prices and found that, for a majority, "free trade" prices ranged from 0.2 percent to 37.4 percent lower.[36] Estimates of the total extra cost to the consumer as a result of resale price maintenance under the "fair trade" statutes varied in amount but, as the House Committee on the Judiciary observed, "[w]hatever the exact figure, it is beyond dispute that resale price maintenance increases the cost to the consumer."[37] For example, the Department of Justice estimated in 1975 that eliminating resale price maintenance by repealing "fair trade" statutes would save consumers approximately $2 billion per year,[38] while the Congressional Research Service estimated the cost of fair trade to consumers in 1973 to have been between $874 million and $8.85 billion.[39]

It is an unrealistic response to this seriously adverse consequence of resale price maintenance to claim that horizontal collusion resulting from such programs can be independently

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[35] *1975 Senate Hearings* at 174-175 (Statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division).

[36] *1975 Senate Hearings* at 174-75 (Statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *1975 House Hearings* at 110 (Statement of Keith I. Clearwaters, Dep. Assistant Attorney General, Antitrust Division).

[37] H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 (1975).

[38] *1975 House Hearings* at 114 (Statement of Keith I. Clearwaters, Dep. Assistant Attorney General, Antitrust Division). The Senate Committee on the Judiciary similarly stated in 1975: "Studies by the Department of Justice which were cited in a 1969 Economic Report of the President, indicate that the consumers would be saved $1.2 billion a year by the elimination of the fair trade laws. Updated for inflation this figure comes to $2.1 billion." S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975).

[39] *1975 Senate Hearings* at 331-32 (Statement of Howard Useem, Economic Analyst, Economics Division, Library of Congress Congressional Research Service).

attacked under the antitrust laws.[40] Proof of collusion is not easy to obtain except in rare instances. The need for express agreements among competing manufacturers to implement a coordinated pricing strategy would, moreover, be reduced or eliminated completely by signals emanating from a resale price maintenance network. In fact, it may very well be that overt or express, *i.e.*, detectable, conspiracies occur most often in those industries *least* conducive to the tacit collusion that could be fomented by generally prevalent vertical price restraints.

Perhaps recognizing the elusiveness of proof in these circumstances, the Justice Department states that "if the market characteristics allow the possibility of anticompetitive effects and no free-rider problem is apparent, then in the absence of a showing by the defendant that the particular resale price maintenance system promotes competition, it should be deemed unlawful."[41] Such a concession, however, holds out no realistic hope for preventing the anticompetitive consequences flowing from vertical price fixing, because the courts will be called upon in each instance to evaluate the market structure, entry conditions, demand and supply elasticity, and possibly a host of other considerations when determining under the rule of reason whether a particular vertical price-fixing agreement aided in the destruction of horizontal interbrand competition and hence was unreasonable.

The eroded deterrence, inherent ambiguity, and imposition on judicial resources of such an analysis are adverse consequences that this Court has sought to eliminate from antitrust enforcement and litigation.[42] The sort of market analysis that may be appropriate in the case of vertical nonprice restraints, which might have a positive influence on expanded distribution and hence interbrand competition,[43] can only pro-

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[40] United States Brief at 23-24, 27.

[41] United States Brief at 24 n.34.

[42] Illinois Brick Co. v. Illinois, 431 U.S. 720, 741 (1977).

[43] Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54-57 (1977).

duce harmful results under price maintenance, which poses an inherent threat to horizontal competition at the manufacturer level.[44]

3. Vertical Price-Fixing Arrangements Are Not Necessary To Accomplish Any Legitimate Purpose

While decreasing both interbrand and intrabrand competition, vertical price restraints lack any "redeeming virtues" to justify their existence. A number of suggestions have been made about ways in which vertical price fixing might enable manufacturers to accomplish legitimate goals;[45] however, each of these goals could be achieved through less restrictive alternatives. Accordingly, there is no justification for treating vertical price fixing as other than illegal *per se*.

Advocates of vertical price fixing have attempted to justify it on the ground that by eliminating intrabrand price competition a manufacturer can enhance interbrand competition because retailers will have to engage in nonprice competition.[46] There is, however, no assurance that retailers who receive additional revenues because the fixed retail price exceeds that which free market forces would yield will use the extra money in the way that the manufacturer desires. As a result, if a manufacturer believes a certain approach will enhance the sale of his products, he should act directly to see that this approach

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[44] The market configuration test proposed by the Justice Department would produce capricious results in some circumstances. Thus, it may be that those advocating such an approach would be more inclined to invalidate resale price maintenance if it is widely used by all or nearly all manufacturers of a product. Such an approach would result in condemnation of a manufacturer's program depending on the subsequent adoption of resale price maintenance by his competitors.

[45] *See, e.g.*, R. Bork, *The Antitrust Paradox* 288-91, 297-98 (1978); United States Brief at 21-29.

[46] *See, e.g.*, United States Brief at 21-23; Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 89-96 (1960).

is followed.[47] For example, the manufacturer itself could engage in promotional activities such as providing product demonstrations or conducting an advertising campaign. Alternatively, the manufacturer could pay promotional and other allowances to retailers who provide services deemed by the manufacturer to make the product more competitive.

There are additional advantages to requiring the manufacturer to act directly with respect to promotion. A primary benefit, of course, is that it leaves intact the retailer's freedom to establish his own prices. This assures some continued level of intrabrand competition even as the manufacturer's marketing strategy is having its affect on interbrand competition. At the same time, prohibiting the manufacturer from distorting his customer's prices places the cost of financing the manufacturer's marketing strategy where it properly should be—on the manufacturer. Thus, the marketplace will impose checks on the cost-effectiveness of the manufacturer's strategy, by placing the financial risk on the manufacturer.[48] If the retail price is elevated by the manufacturer to pay for nonprice competition that does not work, the retailer will suffer the loss since he will already have paid for goods that cannot be sold at the vertically imposed price.

A manufacturer can also realize in-depth distribution of his products under current law by the use of nonprice restrictions such as zones of primary responsibility, limited location sales clauses, territorial limits on solicitation and a wide range of

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[47] Where the manufacturer engages in promotional activities, all retailers benefit. Such is the case, for example, when a manufacturer prepares technical information for distribution or provides or pays for product demonstrations.

[48] An attempted justification of resale price fixing is that it attracts and keeps retailers. *See* notes 45 and 46 *supra*. The alternative that enhances competition and accomplishes the same goal is to offer products desired by consumers and keep the manufacturer's margins low. In this way, the product will compete more effectively against other products, and the consuming public will not pay a premium to underwrite less efficient retailers.

other similar provisions. Such vertical nonprice restrictive devices offer the manufacturer the opportunity for testing whether limitations on distribution do expand product sales without erasing all price competition in the resale of his brand.

In further support of removing the prohibition on vertical price fixing, some have advanced the theory that removing pricing freedom will enhance competition by eliminating so-called "free-riders."[49] Under this theory, only when vertical price fixing is permitted will retailers offer special services to promote the sale of a product (*i.e.*, compete on nonprice matters) because otherwise "the retailers who do not provide the special services get a free ride at the expense of those who have convinced consumers to buy the product."[50] Thus, these theorists speculate that vertical price fixing enhances interbrand competition by eliminating the "free rider" disincentive to promotional activities. Because of this theory's limited theoretical applicability and its failure to describe actual behavior even where it would theoretically apply, the asserted "free rider" phenomenon does not justify relaxing the *per se* treatment of vertical price fixing.

The "free rider" theory is, by its own logic, limited to very few types of services and products. There can be no "free riding" with respect to services that a retailer provides only for products he has already sold, since those services would not be available to customers of other retailers. It is also impossible to take a "free ride" with respect to services that are not specifically related to a particular product but rather have to do with the way that a retailer conducts its business, such as providing luxurious surroundings or a particularly convenient location with ample parking. And no "free ride" can be taken with

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[49] *See, e.g.*, R. Bork, *The Antitrust Paradox* 290-91 (1978); R. Posner, *Antitrust Law* 149 (1976).

[50] Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & Econ. 86, 91 (1960).

respect to services paid for separately from the product.[51] In addition, most types of products do not lend themselves to "free riding." There can be no "free riding" with respect to products whose consumption is not significantly affected by nonprice promotional activities of retailers. For most types of goods, consumers make their decisions based principally on price, personal preferences and experience, and only rarely seek guidance or assistance from the retailer.

Thus, the notion of the "free rider" is extremely limited with respect to the types of goods and services to which it could theoretically apply. Even theoretically, "free riding" is possible only in connection with promotional activities, affecting a consumer's purchasing decision about a specific product, that a dealer provides at his own expense prior to a sale and that convey transferable benefits.[52] While the theory predicts that a consumer will obtain help needed to make a choice from one retailer and then purchase the product from another that does not provide such assistance, this behavior is not, in reality, commonly observed. Moreover, there is no theoretical reason why permitting vertical price fixing would eliminate "free riding." Nothing would prevent a retailer whose prices were fixed from offering a promotional service different from other retailers, so that consumers could take advantage of both. For example, vertical price fixing would not prevent a retailer from providing post-sale services, such as free delivery, instead of

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[51] For example, if a retailer offers a service contract for sale in connection with products it sells or is reimbursed by the manufacturer for performing warranty work, competitors cannot take a "free ride" on these services since the retailer is compensated for providing them regardless of where the product was initially purchased. Where the retailer absorbs the cost of providing warranty service, it need provide this service only with respect to products it has sold; presumably the cost of the warranty was included in the purchase price received.

[52] Of course, a manufacturer who conducts or pays for promotional activity eliminates even the theoretical possibility of "free riding" while assuring that the product receives the promotional activity the manufacturer believes is most beneficial.

pre-sale promotional services available from competitors. Thus, where "free riding" is theoretically possible, vertical price fixing will not prevent it.

Equally significant, the "free rider" theory does not comport with reality. For over 70 years, vertical price fixing has been *per se* illegal, and nonetheless our economy demonstrates a robust diversity of retailing strategies, including specialty stores, expensive department stores, and discount stores. The co-existence of different types of successful retailing operations could not be explained if the "free rider" theory were valid. Not only do different types of stores successfully compete, but many engage in promotional activities, which is clearly inconsistent with what proponents of the "free rider" theory would predict. Moreover, there has been no showing that retailers who charge less for goods provide less in the way of many important, product-related services than do their higher-priced competitors. On the contrary, as one informed observer has stated:

> The Bork-Posner school does not seem to have entertained the proposition that the lower prices reflect lower costs for the performance of those services which are provided by both types of retail stores, nor that the discounter's total service package might more accurately be described as different than rather than inferior to the one offered by the so-called "full service" retailer.[53]

Finally, the pejorative tone of the clever phrase "free rider" must not be allowed to mask who is really being described—traders who compete for sales by offering their products at competitive prices. Nor must this phrase be allowed to obscure the fact that the economic activity in which these businesses engage—vigorous price competition—has almost invariably been recognized as eminently desirable by virtually everyone

[53] Steiner, *Vertical Restraints and Economic Efficiency*, Working Paper No. 66 at p. 13, Bureau of Economics, Federal Trade Commission (1982).

except competitors who wish to escape competition.[54] Vigorous price competitors are an important force in retailing whose continued existence will assure that consumers can obtain the combination of goods and services they desire at the lowest possible price. The self-correcting mechanism of the competitive retail marketplace should not be hindered on the basis of a flawed theory.

CONCLUSION

The Court should limit its review of this case to the issues raised by Monsanto and addressed by the parties. AGMC urges the Court to resolve these issues in such a way that price-competitive retailers can effectively protect themselves from price-fixing conspiracies. The Court need not and should not again address whether vertical price fixing is *per se* illegal. If, however, the Court chooses to consider this issue, it should

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[54] Protection from price-competitive retailers has consistently been an argument used in an attempt to justify vertical price fixing. *See, e.g.*, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 374-75 (1911). The Court has invariably rejected this argument. *See* note 10, *supra*.

strongly reaffirm the legal principle that has served effectively for over 70 years to promote competition and benefit consumers in the United States.

Respectfully submitted,

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No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

vs.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF THE BEVERLY HILLS BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

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Question Presented.

Whether the long-accepted rule that deems vertical price fixing to be per se unlawful under Section 1 of the Sherman Act should be abandoned.

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No. 82-914

IN THE

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Respondent.

BRIEF OF THE BEVERLY HILLS BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT.

Interest of the Beverly Hills Bar Association.

Pursuant to the written consent of the parties,[1] Amicus Curiae Beverly Hills Bar Association herewith submits its brief in support of Plaintiff/Respondent Spray-Rite Service Corporation ("Spray-Rite").

The Beverly Hills Bar Association is a voluntary organization of over 2,200 lawyers, judges and law professors located principally in the western portion of the County of Los Angeles, California. Since its founding in 1932, the Association has had as one of its primary goals promotion of the efficient administration of justice in the California and federal courts. It is this goal which brings the Asso-

[1]Consent from counsel for both parties has been filed with the Clerk of this Court, pursuant to Rule 36.2 of the Rules of the Supreme Court.

ciation to the bar in this case.

Unlike most, if not all, of the other *amici* in this matter, the Association is *not* a party with pecuniary or parochial interest in the outcome. Rather, the Association is composed of attorneys who represent all types of clients, large and small, corporate and individual, defendants and plaintiffs, in the widest range of matters, and other attorneys who represent no particular clients, but whose general views are consonant with the general public's. Also, a substantial number of the Association's members are actively involved in antitrust litigation and counseling. In this role, some of our members must explain the arcana of antitrust to the business community and must deal, at the most practical level, with the constant struggle to maintain compliance with the antitrust laws at the highest level and keep litigation manageable when resort must be taken to that arena.

In short, our principal interest is in the efficient administration of justice in antitrust matters. The evolution of the legal standard for construing the Sherman Act can have a major impact on this interest. At issue here is the continued vitality of this Court's long-standing per se rule against vertical price fixing (or "resale price maintenance"). The per se rule is at issue — although the Court did not explicitly certify this question — primarily because the Antitrust Division of the United States Department of Justice has sought to make this the forum for debating and discarding the per se rule against vertical price fixing.[2]

The Association thus has a substantial interest in the preservation of the rule to the extent it promotes clarity, predictability and efficiency and further to the extent it continues to promote free competition between sellers

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[2]Brief of the United States as Amicus Curiae in Support of Petitioner (hereinafter "Brief for the United States"), at 19-29.

in the marketplace. Faced with the extraordinary intervention of the Department of Justice, in support of Defendant/Petitioner, to undermine the per se doctrine, the Association sees its duty now as defending this Court's existing rule against vertical price fixing.

Summary of Argument.

1. This Court's per se rule against vertical price fixing is the product of 70 years of judicial experience, antitrust scholarship, and clear expressions of Congressional approval. The burden is great on those who now urge abandonment of the rule.

The manageability of antitrust law and litigation is an issue of major importance today in the Nation's legal and business communities. The per se rule provides a clear, logical and manageable standard for those communities, and thus promotes the efficient administration of justice in antitrust matters.

Moreover, the rule enjoins only the most competitively restrictive practice and one virtually never supported by any legitimate rationale provided by price fixers or by their defenders. Abandonment of the per se rule will plunge the courts, counsel and the business community into constant uncertainty about one form of price fixing and will almost certainly open the way for some suppliers to practice the most restrictive available means of control over their distributors.

2. Congress has recently expressed direct approval of the per se status of vertical price fixing in its 1975 repeal of the "fair trade" laws. In that context, Congress reviewed vertical price fixing activities and considered "reasonable" exceptions to the per se rules. Congress instead chose complete repeal of "fair trade" and consciously and overwhelmingly returned the law to the pre-existing rule of per

se illegality.

The proposal by the Department of Justice that the per se prohibition against vertical price fixing be abandoned also constitutes a dramatic shift of its own historical policy. This would work sweeping and controversial changes in the practical operation of the Sherman Act as the public's principal protection against anticompetitive practices. As such, the proposal is essentially legislative in nature and should properly be addressed to Congress, the body responsible for establishing this nation's antitrust policies.

ARGUMENT.

I.

THIS COURT'S FIRMLY ESTABLISHED PER SE RULE AGAINST VERTICAL PRICE FIXING PROMOTES THE EFFICIENT ADMINISTRATION OF JUSTICE IN ANTITRUST MATTERS.

A. The Per Se Rule Against Vertical Price Fixing Is Firmly Established and Should Not Lightly Be Abandoned.

This Court noted in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), that the per se rule against vertical price fixing has been "established firmly for many years,"[3] echoing the Court's prior conclusion in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), that it is a "long-accepted rule in Section 1 cases that resale price fixing is a per se violation of the law."[4]

The government readily acknowledges the present status of the rule,[5] but claims that this Court has never analyzed vertical price fixing to determine if "the practice reduces output, retards innovation, or otherwise interferes with Sherman Act goals."[6] The government takes the view that the per se rule consists, in its essence, of the 1911 decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), and 70 subsequent years of empty presumptions, devoid of "any occasion to look carefully at the actual competitive effects of resale price maintenance."[7]

In fact, quite to the contrary, the per se rule is supported by Court findings and analysis in a long line of decisions

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[3]433 U.S. at 51, n.18.

[4]390 U.S. at 151.

[5]Brief for the United States, at 19-20.

[6]*Id.* at 21.

[7]*Id.* at 19, n.27.

beginning even before *Dr. Miles Medical* and reaching to the present day.[8]

Far from devoid of analytical content, these decisions have identified at least five different reasons justifying per se treatment of vertical price fixing. These include:

(1) the similarities of intent in vertical price fixing and horizontal cartel activity,[9]

(2) common law principles of restraint of trade,[10]

(3) the impermissible interference with price, the "central nervous system" of the economy,[11]

(4) the effect of vertical price fixing in facilitating manufacturer or retailer cartels[12] (an effect conceded by Professor (now Judge) Posner, on whom the government relies heavily[13]), and

(5) the recent Congressional approval of the per se rule in repealing the "fair trade" laws.[14]

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[8]*See Bobbs-Merrill Co. v. Straus*, 210 U.S. 339 (1908); *Bauer & Cie v. O'Donnell*, 229 U.S. 1 (1913); *Boston Store of Chicago v. American Graphaphone Co.*, 246 U.S. 8 (1918); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) ("Undesirable-Price Cutters" program unlawful on its face); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951) ("Fixing minimum [resale] prices, like other types of price fixing, is illegal *per se*.") *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968).

[9]*Dr. Miles Medical, supra*, 220 U.S. at 408.

[10]*Id.* at 406.

[11]*Albrecht, supra*, at 154 (Douglas, J., concurring) ("A fixing of prices for resale is conspicuously unlawful because of the great leverage that price has over the market", citing *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940)).

[12]*White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) (Brennan, J., concurring) (vertical price fixing "almost invariably does in fact reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands.").

[13]*See*, Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 Colum. L. Rev. 282 (1975), noting that "industry-wide resale price maintenance might facilitate cartelizing."

[14]*Sylvania, supra*, at 51, n.18.

Similarly, antitrust scholars have voiced widespread, although admittedly not unanimous, support for the per se rule in this context. Professors Sullivan,[15] Pitofsky,[16] Areeda and Turner[17] are among the prominent and respected scholars[18] who have published views supporting the per se rule. The common theme in these cases and commentaries is that price is the critical variable in our competitive system, and thus, there is imbedded in our antitrust law and policies a heavy presumption against interference with price.

A full-scale substantive analysis of these views is offered by other *amici*,[19] so it will not be duplicated here. For present purposes, the significance of this consistent history of per se treatment is twofold:

(1) The per se rule against vertical price fixing is the product of 70 years of judicial experience, antitrust scholarship, and at least one recent expression of Congressional approval, not some unquestioned and conclusory "received learning", as the government implies.[20] Although the rule has recently had its critics among a group of economists representing one end of the continuum of economic thought, which may now be in vogue, it is nevertheless well sup-

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[15] L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST (1977) at 377-399.

[16] Lifland, Pitofsky & Popofsky, *Advising Clients On Vertical Restraints*, 51 ANTITRUST L.J. 50, 51-52 (1982) [hereinafter cited as Pitofsky].

[17] *See*, 3 P. Areeda & D. Turner, ANTITRUST ANALYSIS, Section 828d (1978); *see also*, Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962).

[18] *E.g.*, Reich, *The Future of Unfair Methods of Competition*, 50 ANTITRUST L.J. 801, 805-806 (1982).

[19] *See, e.g.*, Brief for Amicus Curiae National Association of Attorneys General in Support of Respondent.

[20] Brief for the United States as Amicus Curiae (Petition for Writ of Certiorari), at 17.

ported and precedented.

(2) The burden is great on those who would abandon this firmly established rule, perhaps greater than it would be on the opponents of most such lasting rules. Any such change should not be undertaken lightly or hastily.

B. The Per Se Rule Provides a Clear and Manageable Standard for the Legal and Business Communities.

The manageability of antitrust law and litigation is an issue of paramount importance today in the Nation's legal and business communities. In 1977 the National Commission for the Review of Antitrust Laws and Procedures (NCRALP) was formed to develop recommendations for improving the antitrust laws and the management of antitrust litigation, in response to recognition of the problem of "the complex . . . multiyear, sometimes multimillion dollar phenomenon" of the civil antitrust case.[21] The Commission later concluded that many antitrust cases "absorb enormous resources and time" and further found that:

> [U]ndue delay is a serious problem in a significant number of complex antitrust cases. The resulting burdens on litigants and the courts are great. Excessive public and private resources are needlessly expended; confidence in antitrust enforcement and the judicial process is weakened; and effective enforcement is impeded . . . . In short, the overall effectiveness of the antitrust laws in promoting a competitive economy is impaired.[22]

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[21]National Commission for the Review of the Antitrust Laws and Procedures, Report to the President and the Attorney General (Jan. 22, 1979) at 4 [hereinafter "NCRALP Report"]; *See also*, Exec. Order No. 12022, Sections 2(a)(1)-2(a)(2), 3 C.F.R. 155, 156 (1977).

[22]NCRALP Report, *supra*, at 3-4.

The recent 13-year action of *United States v. International Business Machines Corp.*, No. 69 Civ. 200 (S.D.N.Y. filed Jan. 17, 1969) is merely the most visible example, among scores of cases, of the morass that antitrust litigation can become.[23] This potential for enormously complex and protracted litigation puts a premium on efficiency in the antitrust process. No one suggests that abandonment of per se rules will do anything but make that potential even more often the reality.

Per se rules play a key role in insuring the manageability of the antitrust laws. Professors Areeda and Turner state:

> [T]hat rule [of per se unlawfulness for price fixing] rests on various judgments about facts, economics, and social policy . . . . [S]uch presumptions are the means by which we reach intelligible and consistent conclusions in the uncertain world of antitrust . . . . [T]hey guide the intellectual process of trying to reach intelligent, disciplined, and consistent conclusions in an untidy universe.[24]

Justice Black, speaking for the Court in *Northern Pacific Railway v. United States*, 356 U.S. 1 (1958), described the importance of per se rules thus:

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[23]The statistical report of Professor Peter Gerhart for the NCRALP revealed the following facts about the IBM litigation (current as of December, 1978): The government produced approximately 26 million pages of documents; IBM produced about 65 million pages. More than 1,300 depositions were taken. In its first three years of trial, the case generated a transcript of 84,586 pages, with 8,103 documents, totalling 211,756 pages, introduced in evidence. The government's litigation team numbered 35; IBM was estimated to have employed more staff, counting both outside and in-house counsel. Of course, the IBM matter was extraordinary, and major monopoly cases may often be more complex than vertical restraint cases. However, the NCRALP found the median total time for private antitrust cases reaching trial to be *44 months*. *Id.* at 3, n.1. This suggests that the problems of complexity and unmanageability are common to many, if not most, civil antitrust cases.

[24]2 Areeda & Turner, *supra*, Section 314b at 47-48.

> This principle of per se unreasonableness not only makes the type of restraints which are proscribed more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable — an inquiry so often wholly fruitless when undertaken.[25]

The per se rules are also based partly on this Court's reluctance to rely too heavily on ever-changing economic theories. Justice Marshall noted in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972): "Without the *per se* rules, businessmen would be left with little to aid them in predicting in any particular case . . . ."[26] He concluded:

> Should Congress ultimately determine that predictability is unimportant in this area of law, it can, of course, make per se rules inapplicable in some or all cases and leave courts free to ramble through the wilds of economic theory in order to maintain a flexible approach.[27]

Earlier Dean Bok had expressed this concern in more dramatic terms, warning of the difficulties courts may encounter when they:

> succumb to the economists who bid us enter the jungle of "all relevant factors," telling us very little of the flora and fauna that abound in its depths, but promising rather vaguely that they will do their best to lead us safely to our destination.[28]

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[25] *Northern Pac. Ry.*, 356 U.S. at 5.

[26] *Topco Associates*, 405 U.S. at 609, n.10.

[27] *Id.*

[28] Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 227 (1960).

His observation is no less valid today.

This Court's opinion in *Sylvania, supra*, acknowledges that "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and on the judicial system [redacted] of reason trials."[29] The [redacted] provides just such clear guidance in an area of continuing concern to businesspersons and the lawyers who counsel them.

Business planners want and need predictability in the legal environment. Planners of product distribution systems desire this clarity no less than other businesspersons. The per se rule provides those planners, and the lawyers and courts who must deal with them, something more concrete to guide them than economic theories that change with each new school of fashionable economic thought.

Per se rules in antitrust — like all rules of law — entail some costs. In the case of per se rules against price fixing, one of those costs is the occasional case where more perfect justice might be done by undertaking the incredibly complex analysis of purpose, power, effects, industry history and other factors mandated by the rule of reason. But this Court has long found those occasional costs worth bearing where price fixing is at issue.

Moreover, the costs entailed in treating vertical price fixing as per se illegal are clearly minimal, since only the most onerous restraint that a supplier can inflict upon a dealer (deprivation of the freedom to set one's own prices) is deemed to be illegal as a consequence of application of

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[29] *Sylvania*, 433 U.S. at 50, n.16. The Court also noted that "these advantages are not sufficient in themselves to justify the creation of per se rules." *Id*. However, in the instant case we are concerned not with the *creation* of a per se rule, but rather with the *preservation* of a per se rule which has been "established firmly for many years." *Id*. at 51, n.18.

the per se rule. A supplier who, in fact, wishes to achieve legitimate ends by vertical control can invariably do so by more direct and less economically restrictive means than by resale price fixing. In the real world, if a manufacturer truly wants "its distributors to provide costly promotional, warranty, or other ancillary services and thereby [to] increase the attractiveness of the product,"[30] to eliminate the so-called "free rider" effect (as argued by the government), then the manufacturer can obtain those services in a feasible alternative to price fixing by simply and directly contracting for them.[31]

How could higher prices, without more, ever assure that all sellers would promote and service the product exactly as the supplier wishes? Common sense is not rebutted by the unsubstantiated speculation of the "anti-free-rider" school. The obvious abundance of business alternatives to vertical price fixing that are less restrictive of competition has been emphatically noted by antitrust scholars who have published views supporting the per se rule.[32]

This Court has long recognized the utility of a "less restrictive alternative" standard and has applied it in a variety of settings. Examples include regulation of expression[33] and *economic* regulation.[34] The "less restrictive alternative"

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[30]Brief for the United States, at 21.

[31]Pitofsky, *supra*, at 52-53.

[32]Sullivan, *supra*, at 382-387; Pitofsky, *supra*, at 52-53.

[33]*See, Shelton v. Tucker*, 364 U.S. 479 (1960).

[34]*See, Dean Milk v. City of Madison*, 340 U.S. 349 (1951). Indeed, this Court's opinion in *Sylvania, supra*, balancing the benefits and burdens on intrabrand vs. interbrand competition can be construed as supplying a form of "less restrictive alternative" test in which "the elimination of intrabrand competition . . . was, in essence, the lowest price that the marketplace could pay for making Sylvania a viable interbrand competitor." Disner, *The Rule of Reason: Fudge Factor in Antitrust Law*, L.A. Daily J., Rep. No. 79-13, July 13, 1979, at 4, 7. Note that the location clause in question did not prevent *price* com-

approach can be applied with equal utility to check the type of private economic regulation by suppliers which the government apparently now wishes to abet.

It cannot be shown that *any* of the goals touted by the government as legitimate aims of resale price fixing need be achieved by alternatives as restrictive as freezing the vital element of price. Thus, the only real "cost" of the application of the per se rule against vertical price fixing is to require suppliers to use less restrictive, even if still *quite* restrictive, means of vertical control. Those less restrictive means of vertical control can then be measured under the rule of reason, if at all.

In light of the extensive precedent for, and common sense underlying, the per se ban against vertical price fixing, the burden should be on the proponents of a rule of reason approach to demonstrate that the benefits of that approach outweigh the aggregate of its enormous procedural costs and the potential competitive harm of the practice itself. We submit that the proponents have not met and cannot now meet that burden.

Abandonment of the per se rule will plunge the courts, counsel, and the business community into constant uncertainty regarding one form of price fixing. Antitrust counselors, including many members of this Association, already face considerable difficulty in explaining to laypersons the present rule against all forms of price fixing. Today, however, a lawyer can at least answer a clear "no" to the question, "May I agree on or fix prices with others?"

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petition for Sylvania T.V. sets there. *See*, opinion of the Ninth Circuit affirming the decision of the district court on remand, *Continental T.V. Inc. v. G.T.E. Sylvania, Inc.*, 694 F.2d 1132, 1137-1138 (9th Cir. 1982) *aff'g*, 461 F.Supp. 1046 (N.D. Cal. 1978). In fact, the District Court in *Sylvania* on remand applied a "least restrictive alternative" test in dismissing Continental's complaint. 461 F.Supp. at 1052.

Under the government's proposal, counselors will be left with the task of explaining that the answer is "maybe" and depends on the distinction between horizontal and vertical relationships and on all the factors that make up rule of reason analysis. Few businesspersons and fewer practicing antitrust counselors will welcome this plunge into the jungle of "all relevant factors."

The result of abandoning the per se rule will be more of the gargantuan and costly economic inquiries about which the Court warned in *Northern Pacific Railway, supra*. Less will be gained in identifying the rare defensible use of price fixing than will be lost in many fruitless and costly inquiries.[35]

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[35]The government also argues that this Court's distinction in *Sylvania, supra*, between price and non-price restraints is unworkable. (Brief for the United States, at 12-13, 19; Brief for the United States (Petition for Certiorari), at 13-14. Courts have readily dealt with this distinction in prior cases without undue difficulty.

For example, In *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978), the First Circuit applied the *Sylvania* standard to allegations that a scientific instrument distributor had imposed a combination of territorial and price restraints on an instrument dealer. The court easily distinguished between a price scheme designed only to serve territorial goals and a price plan free of nonterritorial aspects. *Id.* at 885-886. *See also, Pitchford Scientific Instruments Corp. v. PEPI, Inc.*, 435 F.Supp. 685 (W.D. Penn. 1977), decided just after *Sylvania*, in which the trial court readily differentiated among price and non-price restraints, finding that the alleged territorial restraints were ancillary to price restraints, and thus were subject to per se analysis. In practice, the price/non-price distinction is a rather narrow issue of characterization similar to many such issues in antitrust. Pitofsky, *supra*, at 52-53.

We see no insurmountable difficulty for the courts in such an analysis. It is most unlikely that courts will find "rambles through the wilds of economic theory" in the rule of reason easier than the narrow analysis of price vs. nonprice character as undertaken in *Wild Heerbrugg, supra*, and *Pitchford Scientific, supra*.

II.
CONGRESS IS THE APPROPRIATE FORUM FOR THE DEPARTMENT OF JUSTICE PROPOSAL TO MODIFY THE PER SE RULE.

A. Congress Has Recently Expressed Its Approval of the Per Se Rule in Repealing the "Fair Trade" Laws.

The intent of Congress, reflected in its passage and subsequent modification of the Sherman Act, is the touchstone for interpreting the Act.[36] Congress has recently expressed direct approval of the per se status of vertical price fixing in its 1975 repeal of the "fair trade" laws, the Miller-Tydings and McGuire Acts. *See* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, Section 2, 89 Stat. 801 (1975). In repealing "fair trade," Congress expressed unambiguous opposition to vertical price fixing in general.

Virtually all of the extensive reported comments on the repeal legislation are to this effect. A brief sampling of the remarks of the bill's principal sponsors demonstrates the intent of Congress regarding vertical price fixing. The bill's original sponsor, Senator Edward Brooke, described the "major distortions" of our economy resulting from vertical price fixing as: "First, artificially high prices; second, restraint of innovation and efficiency; and third, an increased reliance on costly promotional devices that increase prices."[37]

The Report of the House Committee on the Judiciary, submitted by Committee Chairman Peter Rodino, discussed *Dr. Miles Medical, supra*, and its progeny at length and

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[36]*See, generally*, 16 J. Von Kalinowski, *ANTITRUST LAWS AND TRADE REGULATION*, Section 2.01 (1983 ed.).

[37]120 CONG. REC. S. 20361, S. 20363 (daily ed. Dec. 3, 1974) (Remarks of Sen. Edward W. Brooke introducing S. 4203, 93d Cong., 2d Sess.).

approvingly, with clear reference to the fact that vertical price fixing "is *per se* illegal under section 1 of the Sherman Act."[38] The Report offered a detailed critique of the harmful effects of resale price maintenance, concluding that such activities "contribute little but artificially high prices for consumers" and also "facilitate horizontal price fixing by manufacturers."[39] The Report also summarized a number of studies to the same effect. Most notably, the Report cited two studies, by the same Antitrust Division presently supporting Defendant/Petitioner in this matter, which demonstrated that *prices up to 37.4 percent higher resulted from resale price maintenance activities.*[40]

The co-sponsor of the Consumer Goods Pricing Act in the House of Representatives, noted that, absent the fair trade statutes, vertical price fixing arrangements "would be per se violations of the antitrust laws."[41] She urged their return to that status, having noted remarkable unanimity for repeal among the courts, the antitrust agencies, (including the Antitrust Division), consumer groups and large segments of the business community.[42]

The final absolute repeal of "fair trade" passed both houses with virtually no opposition[43] and was signed into

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[38]H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 1-2 (1975).

[39]*Id.* at 1.

[40]*Id.* at 3.

[41]121 CONG. REC. H. 7103 (daily ed. July 21, 1975).

[42]*Id.*

[43]Congress, in addressing the issue of the "fair trade" laws, considered and rejected two proposals with content similar to aspects of a rule of reason analysis. The first of these was a proviso which would have allowed maximum price fixing for newspapers. *See*, Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. Pts. 1-2 (1975) [hereinafter cited as 1975 Senate Hearings]. A second alternative would have allowed vertical price fixing in cases of new companies or products. *Id.* at 75-92; *See also*, Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 94th Cong., 1st Sess. (1975) [hereinafter cited as 1975 House Hearings]. Neither proposal was adopted by either the Senate or House committee. 1975 Senate Hearings; 1975 House Hearings.

law on December 12, 1975, by President Ford, who had enthusiastically supported the repeal.[44]

Thus Congress reviewed vertical price fixing activities, in the context of repealing the "fair trade" laws, and had a clear opportunity to abandon the per se standard or provide for "reasonable" exceptions to the standard. Congress instead chose complete repeal and consciously returned the law to the preexisting per se rule, without exceptions. This is a remarkably clear signal of Congressional intent regarding vertical price fixing. The Department of Justice should not now blithely brush aside that intent.

B. The Department of Justice Proposal Is Essentially Legislative in Nature and Should Be Addressed to Congress.

The Department of Justice, under the current Administration, has changed its position on vertical price fixing activities from that of thirteen prior Administrations (seven Republican and six Democratic). The Department testified and lobbied actively *against* resale price maintenance in the 1975 Congressional hearings on the repeal of the "fair trade" laws.[45] However, the *current* Assistant Attorney General has made clear his intention to direct litigation resources of the Antitrust Division toward achieving the abandonment of the per se rule against vertical price fixing.[46] It has also been reported that the Antitrust Division is currently con-

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[44]Statement By President Gerald R. Ford Upon Signing the Consumer Goods Pricing Act of 1975, 11 WEEKLY COMP. PRES. DOC. 1367 (Dec. 12, 1975).

[45]*See*, 1975 Senate Hearings at 16-21 (testimony of Thomas A. Kauper, Assistant Attorney General, Antitrust Division); 1975 House Hearings at 109-21 (testimony of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

[46]*See*, Congress Objects As Administration Seeks Relaxation of "Vertical Price-Fixing" Ban, *Wall Street Journal*, May 16, 1983, at 14, col. 1.

sidering a legislative proposal which would achieve the same result.[47]

While most authorities are in accord with the view recently expressed by Justice White in his dissent in *Bankamerica Corp. v. United States*, 51 U.S.L.W. 4685 (1983) that there is no formal rule of administrative *stare decisis*,[48] the majority in *Bankamerica* held that a long-standing apparent interpretation of an antitrust statute by the Antitrust Division was entitled to considerable weight in evaluating a new enforcement philosophy espoused by the Division.[49] The Court then rejected that new enforcement policy (regarding interlocking directorates). Similarly, Justice White noted that if the FTC or the Antitrust Division adopts an interpretation of an antitrust statute, and then changes that interpretation, "the present interpretation would not be entitled to the usual degree of deference, since it [is] inconsistent with [the] previous view."[50]

Clearly, the Antitrust Division may change its views. But the weight given to a novel proposition, such as the proposed abandonment of the per se rule here, should be less than usual, in light of 70 years of generally consistent Antitrust Division interpretations to the contrary.

More significantly, given the recent Congressional approval of the per se rule, the rule is most appropriately reconsidered — if at all — by Congress. A useful analogy may be found in this Court's reasoning regarding the an-

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[47]*See*, 44 ANTITRUST & TRADE REG. REP. (BNA) No. 1098, at 105 (Jan. 20, 1983).

[48]51 U.S.L.W. at 4693 (dissenting opinion).

[49]*Id.* at 4688 (majority opinion).

[50]*Id.* at 4693 (dissenting opinion) (citing *Bowsher v. Merck & Co.*, 75 L.Ed.2d 580 (1983) (White J., concurring in part and dissenting in part); *General Electric Co. v. Gilbert*, 429 U.S. 125, 142-143 (1976); *Morton v. Ruiz*, 415 U.S. 199, 236-237 (1974)).

titrust exemption for organized baseball in *Flood v. Kuhn*, 407 U.S. 258 (1972). There, this Court chose to uphold a 50 year old precedent exempting baseball from the antitrust laws on the rationale that Congressional inaction, taken in context, showed the intent of Congress to allow the exemption. "We continue to be loath . . . to overturn those [early] cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively."[51]

The argument for such an interpretation is even stronger in this matter. Congress has recently indicated positive approval of the per se rule in vertical price fixing cases. The Department of Justice should be most reluctant now to urge and this Court to accept reversal of a long-standing antitrust doctrine for which Congress has showed recent support.[52]

As the issue of the continued vitality of the per se rule was not certified in this matter, the issue need not be decided at all on these facts. Given the legislative nature of the Department of Justice proposal, judicial deferral here may prompt the legislative proposal and Congressional consideration that is most appropriate for this policy matter.

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[51]*Flood v. Kuhn*, 407 U.S. at 283-284.

[52]The government embraces *Sylvania, supra*, as an example of the authority of this Court to modify its prior antitrust standards. Brief for the United States, at 20, n.29. While the Court certainly has authority to modify its standards, it exercised that authority in *Sylvania* under very different circumstances than those presented in the instant case, since in the area of non-price restraints there had been no recent expression of Congressional intent parallel to the repeal of the "fair trade" laws in this case. *See, Sylvania, supra*, 433 U.S. at 51, n.18 ("No similar expression of Congressional intent exists for non-price restraints."). Moreover, the precedent overturned in *Sylvania, United States v. Arnold Schwinn Co.*, 388 U.S. 365 (1967), had endured for but ten years, and was thus hardly an established rule of law on the same footing as the per se rule against price fixing, which is the product of seven decades of judicial scrutiny, congressional approval and academic discourse.

Conclusion.

The Court's firmly established rule against vertical price fixing promotes the efficient administration of justice in antitrust matters and comports with recently-expressed Congressional intent. This Court should reject the Department of Justice invitation to abandon the rule.

Respectfully submitted,

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No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

—v.—

SPRAY-RITE SERVICE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE BURLINGTON COAT FACTORY WAREHOUSE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF SPRAY-RITE SERVICE CORPORATION

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On Behalf of *Amicus Curiae*
Burlington Coat Factory
Warehouse Corporation

QUESTION PRESENTED

Whether this Court should reach out to abandon 70 years of established policy that has deemed resale price maintenance agreements *per se* illegal under Section 1 of the Sherman Act 15 U.S.C. Section 1.[(1)]

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(1) The Burlington Coat Factory Warehouse Corporation does not deal in this brief with the Court's resolution of the two primary questions with which the Court is properly faced and for resolutions of which the Court granted certiorari. However, it is submitted that the Seventh Circuit's decision was essentially correct and should be affirmed.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

NO. 82-914

MONSANTO COMPANY, PETITIONER

v.

SPRAY-RITE SERVICE CORPORATION, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE BURLINGTON COAT FACTORY
WAREHOUSE CORPORATION AS AMICUS CURIAE

This brief is filed on behalf of the

Burlington Coat Factory Warehouse Corporation

in support of Respondent. Consent from counsel for both parties is to be filed simultaneously with the Clerk of this Court.

INTEREST OF THE BURLINGTON COAT FACTORY WAREHOUSE CORPORATION

Through its wholly-owned subsidiaries, Burlington Coat Factory Warehouse Corporation ("Burlington") operates a chain of "off-price" clothing stores with more than thirty locations throughout the Eastern, Southern and Midwestern portions of the United States. Burlington's business has prospered because of its ability to sell full lines of first quality men's and women's clothing at prices that are generally twenty-five (25%) percent below the retail prices charged by most large

department stores which are its principal competitors.

Burlington is interested in the outcome of this action because any retreat from this Court's view that retail price maintenance is a per se violation of the Sherman Antitrust Act would have a devastating impact upon its business. Burlington's entire marketing strategy depends upon its ability to engage in vigorous price competition at the retail level. Over the years, certain manufacturers have informed Burlington that its low pricing policies have caused dissatisfaction among Burlington's competitors. Some such manufacturers have, from time to time, requested that Burlington raise its prices to alleviate such dissatisfaction. But for the strict

antitrust policy against retail price fixing, many such manufacturers would undoubtedly have terminated sales to Burlington or forced it to adhere to high, uncompetitive prices which would do violence to Burlington's fundemental marketing philosophy.

Accordingly, Burlington and all clothing retailers which thrive on vigorous price competition have a substantial interest in the outcome of this case should the Court determine to accept the Antitrust Division's invitation to reconsider the rule that retail price maintenance constitutes a *per se* violation of the antitrust laws.

STATEMENT

Monsanto Company has urged reversal of

the decision in Spray-Rite Service Corp. v. Monsanto Co., 684 F.2d 1226 (7th Cir. 1982) on two grounds. A third purported basis for reversal has been injected into this litigation by the Department of Justice in its brief amicus curiae, i.e., that "all vertical restrictions, including resale price maintenance, should be analyzed under the rule of reason." (Brief for the United States as Amicus Curiae at 13). It is Burlington's position that the Seventh Circuit's determination should be affirmed and that the de novo contentions of the Justice Department respecting resale price maintenance should not be considered and, if considered, should be rejected.

SUMMARY OF ARGUMENT

It is submitted that this case is an inappropriate vehicle for the Court to re-examine a fundamental rule that has been the antitrust law of the land for over seventy years. In its brief, Monsanto Company does not question the fundamental principal that vertical price fixing is a *per se* violation of the antitrust laws. The issue is before the Court only because of its extraordinary interjection by the Department of Justice in its *amicus curiae* brief. Accordingly, the issue has received no meaningful development by the respective parties or the Courts below.

It is submitted that, if there is any merit to effecting such a change in policy,

it is for Congress rather than this Court to bring it about. Congress has already evaluated vertical price fixing in repealing the "Fair Trade" statutes and, in so doing, has made clear its view that such restraints have no economic justification.

Should the suggested reevaluation by this Court take place, the Court should re-assert that vertical price fixing is inherently harmful to interbrand and intra-brand competition and that there is no ecomomic justification for subjecting it to the rule of reason.

ARGUMENT

1. THE QUESTION OF WHETHER VERTICAL PRICE FIXING SHOULD REMAIN A *PER SE* VIOLATION OF THE ANTITRUST LAWS SHOULD NOT BE REACHED

Burlington submits that the decision of the Seventh Circuit was essentially correct and should be affirmed without referance to the vertical price fixing issue interposed by the Antitrust Division. The reasons why the Antitrust Division's invitation to reconsider long-established precedent should be declined are manifold.

A. The long-established prohibition against retail price maintenance has afforded business organizations a degree of certainty as to what conduct is and is not permissable. Subjecting such restraints to rule of reason analysis would place each component in a distribution chain in a state of doubtfulness as to the legality of its acts. Abandonment

of the _per se_ rule would result in numerous businesses embarking on price-fixing programs in the hopes of withstanding a rule of reason challenge. Such a development would clearly result in opening a Pandora's box of complex litigation aimed at ascertaining the purpose and effect of various price-fixing arrangements. It would also place retailers and distributors in a perilous dilemma when deciding whether to purchase a given line of merchandise subject to a fixed resale price: A decision to purchase could result in antitrust litigation and liability while a decision not to buy could mean the loss of substantial business. Adherance to the present _per se_ rule would obviate such uncertainty and permit the market place to

continue to function in an orderly manner.

B. The doctrine of stare decisis militates in favor of leaving the law in its present state. It is submitted that an unbroken string of clear holdings (2) of this Court over a period of seventy years cannot be lightly disregarded without severly undermining the principle of stare decisis.

C. It is submitted that any decision to alter the present rule respecting resale price maintenance should be left to Congress and that Congress has already signified that

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(2) *E.g.*, *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 273 (1911); *United States v. Park, Davis & Co.*, 362 U.S. 29 (1960); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

it desires no change in the law.

This Court has recognized that Congress is in a better position than it to fully evaluate the ramifications of changes in antitrust policy:

> "[I]t is 'not for [this Court] to indulge in the business of policy making in the field of antitrust legislation . . Our function ends with the endeavor to ascertain from the words used, construed in the light of the relevant material, what was in fact the intent of Congress.'" Jefferson Country Pharmaceutical Ass'n v. Abbot Laboratories, 103 S.Ct. 1011, 1063 (1983)

Indeed, Congress's view that the per se rule should remain the law may be ascertained from its long acquiescence in the rule and its approval of the rule as demonstrated by repeal of the "Fair Trade" laws:

> "Congress recently has expressed its approval of a _per se_ analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states." _Continental T.V. Inc. v. GTE Sylvania, Inc._, 433 U.S. 36, 51 n.18 (1977).

Accordingly, the Court should decline the Antitrust Division's tacit request that this Court consider adopting a standard at odds with the implicit and express intention of Congress.

II. ANY REEVALUATION BY THIS COURT OF THE STANDARDS GOVERNING VERTICAL PRICE RESTRAINTS SHOULD RESULT IN THE REASSERTION OF THE PER SE RULE

If the validity of the _per se_ rule is reexamined, the Court should adhere to it.

Both intrabrand and interbrand competi-

tion will be harmed if the law is changed. It is self-evident that resale price maintenance stifles intrabrand price competition. Intrabrand competition, while of less significance than interbrand competition from an antitrust point of view, is clearly of substantial benefit to consumers and low-price retailers such as Burlington. Under present market conditions, consumers of clothing products enjoy a wide range of choice among the prices they pay for items of apparel. Burlington's prices tend to be twenty-five (25%) percent below those charged by large department store chains. This price differential has resulted in robust competition between Burlington and department stores which have often dropped their prices in an

effort to meet Burlington's challenge. The ultimate beneficiary of such free play in the market has been the consumer. Permitting clothing manufacturers to fix the resale price of their wares would inevitably eliminate such benefits. This Court has recognized that the interest of the consumer is a primary concern of antitrust enforcement:

> "It is in the sound commercial interest of retail purchasers of goods and services to obtain the lowest price possible within the framework of our competitive free enterprise system. The essence of the antitrust laws is to ensure fair price competition in an open market." Reiter v. Sonotone, 442 U.S. 330, 342 (1979).

Elimination of the *per se* rule would harm interbrand competition as well. The

Justice Department's position notwithstanding, this Court has already expressed the view that "[r]esale price maintenance is not only designed to, but almost invariably does, in fact, reduce price competition not only <u>among</u> sellers of the affected product, but quite as much <u>between</u> that product and competing brands." <u>Continental T.V. Inc. v. GTE Sylvania, Inc.</u>, 433 U.S. 36, 51 n.18 (1977).

Accordingly, the Justice Department's position that interbrand competition might somehow be fostered by abandonment of the <u>per se</u> rule flies in the face of this Court's contrary view.

In addition, the Justice Department's fundamental premise is that only the manufac-

turer's marketing strategies should be taken into consideration when scrutinizing the validity of the *per se* rule. This approach completely ignores Congress's intention as expressed in the legislative history surrounding the repeal of the "Fair Trade" laws. Such legislative history reveals that Congress intends the relevant aspects of the antitrust laws to benefit retailers and consumers as well as manufacturers:

> "Some retailers prefer to try to enlarge their share of the market by competing vigorously in price--prescisely (sic) the sort of behavior encouraged by our antitrust laws. This competition is stifled by 'fair trading'". H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 (1975).

* * * *

> "To the extent that the 'Mom and Pop' retailer charges a higher price because he is providing more services to his customers, consumers should have the freedom to choose between paying more for these services and buying nothing but the unadorned product at a lower price from a competitor." H.R. Rep. No. 94-341, 1st Sess. 4 (1975).

Thus, the Justice Department's notion that the only purpose of the vertical aspects of the antitrust laws should be to give unbridled freedom to manufacturers contradicts the will of Congress. That branch of government has declared that the interests of retailers and consumers are protected by adherance to the _per se_ rule and, accordingly, the Justice Department's position can only be adopted in defiance of express legislative intent.

In short, the Justice Department's approach is posited on an economic theory which is repugnant to the holdings of this Court and the views of Congress. It should therefore be rejected.

CONCLUSION

Burlington submits that the Court should affirm the determination of the Seventh Circuit without conducting a reevaluation of a legal principle which has governed the operation of our economic system for more than seventy years. If, however, the Court elects to address the question raised by the Antitrust Division, it should reaffirm its oft-stated position that vertical price restraints

constitute *per se* violations of the antitrust laws.

Respectfully submitted,

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Dated: July 13, 1983

No. 82-914

IN THE

Supreme Court of the United States

October Term, 1982

MONSANTO COMPANY,

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF DAYTON-HUDSON CORPORATION

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BRIEF AMICUS CURIAE OF DAYTON-HUDSON CORPORATION

Dayton-Hudson Corporation ("Dayton-Hudson") submits this brief, with the written consent of the parties, as *amicus curiae* in opposition to the argument advanced in Part II.B. of the Brief for the United States as Amicus Curiae in Support of Petitioner that this Court should overrule the long-standing principle that resale price maintenance schemes are *per se* illegal under the Federal antitrust laws.

To the extent that this *per se* rule provided an underlying basis for the Seventh Circuit decision under review, see 684 F.2d at 1234, Dayton-Hudson is appearing in support of that decision. However, Dayton-Hudson takes no position with respect to the Questions Presented by Petitioner Monsanto Company.

IDENTITY AND INTEREST OF DAYTON-HUDSON CORPORATION

A. Dayton-Hudson Corporation

Dayton-Hudson is a rapidly growing corporation engaged exclusively in retailing a broad range of consumer products. At the end of its most recent fiscal year, January 29, 1983, Dayton-Hudson operated 981 stores in 47 States, the District of Columbia and Puerto Rico, had over $5-1/2 Billion Dollars in sales, and was the fifth largest non-food retailer in the country.

Dayton-Hudson offers merchandise to consumers through eight wholly-owned, autonomously managed operating companies. Four of these companies are traditional department store groups headquartered in Minneapolis, Detroit, Phoenix and Oklahoma City which offer a wide range of products for the entire family, including consumer apparel and accessories, home furnishings and electronics. Two of the fastest growing companies are Target, which operates over 200 discount department stores in twenty States, and Mervyn's, a highly promotional, popular-priced, specialty department store company operating in the western United States. The other two operating companies conduct multi-store "specialty merchandising" operations: B. Dalton Bookseller, a national bookstore chain, and Lechmere, Inc., a popular-priced New England retailer of "hard" lines such as appliances.

In addition to these established retailing organizations, Dayton-Hudson has recently opened two new types of stores: Plums . . . The Elegant Discounter, which offers moderate to better quality designer and brand name apparel for women and men at prices 20% to 50% below conventional stores, and Pickwick, a discount book retailer.

B. Interest of Dayton-Hudson and Summary of Its Position

The retailing strategies in Dayton-Hudson's array of operating companies run the gamut from fashion-oriented department stores which provide quality merchandise and extensive service and facilities, to off-price apparel and discount book stores operating in relatively spartan surroundings and offering exceptionally low prices. Of great significance to the legal issues presented in this case, however, is the fact that most of Dayton-Hudson's growth in the last decade—a period when the corporation grew more rapidly than almost all of its national retailer competitors—has come from the discount and popular-price store groups, particularly Target and Mervyn's.

Dayton-Hudson's successful emphasis on price-oriented retailing of quality merchandise reflects the corporation's perception of a basic change in the American consumer's buying practices. This perception was described to Dayton-Hudson shareholders as follows:

> One of the most significant strategic issues to surface in recent years is the increasing importance of value to the retail shopper. We first identified this consumer focus during the 1974-75 recession, when many Americans experienced the worst economic setback they had ever known. Customers became far more alert to getting the most out of their shopping dollars. They began to scrutinize their purchases carefully, making each one more meaningful. They also made the concept of quality a more important part of their value definition.
>
> * * * * *
>
> As we developed our long-range plans during the last half of the 1970's, we recognized that this emerging value orientation signaled the need for a shift in our strategic

> direction. We began to reposition our business accordingly, directing increasing capital expansion to Target and completing our merger with Mervyn's. *Dayton-Hudson Corporation Annual Report for 1981*, p. 4.

Most recently, this perception has prompted Dayton-Hudson to launch two innovative off-price and discount retailing strategies, Plums and Pickwick.

Innovation in retailing reflecting more efficient forms of distribution to meet new customer demand is by no means unique to Dayton-Hudson. This phenomenon has often been explained by a theory known as the "Wheel of Retailing." First articulated by Malcolm McNair in the late 1950's,[1] the theory advances the proposition that new forms of retailing begin with low-margin, low-priced stores. Gradually, these innovators trade up by offering more services, higher prices and additional amenities leaving a void to be filled by the next generation of innovators. For example, department stores, once an innovative strategy themselves, were confronted by discounters in the 1950's and 1960's. As the discounters are now maturing businesses, new forms of retailing, such as off-price, no-frills stores, are entering the marketplace. Examples of these fledgling strategies relying on the value inherent in low prices exist in almost every type of retailing and in every geographic market. Clothing retailers such as Marshalls, Loehmans and Filene's Basement; bookstores such as Crown Books; and no-frills supermarkets such as Cub Foods are now commonplace.

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[1] *McNair, Significant Trends and Development in the Post-War Period, in Competitive Distribution via Free High-Level Economy and Its Implications for the Universities* (1958).

Judging by the Brief for the United States as Amicus Curiae in Support of Petitioner, however, this world of the retail store is far removed from the world of the wholesale distributor of agricultural chemicals. In Dayton-Hudson's experience, most manufacturers of basic consumer products—such as apparel, cosmetics, non-prescription drugs, and small appliances—are not concerned that retailers provide the costly "ancillary services" described in the Brief for the United States as Amicus Curiae, at pp. 14-18. Rather, consumer product manufacturers simply want their products effectively displayed at competitive prices by aggressive and popular retailers.

On the other hand, in addition to the desire of some consumer product manufacturers to limit their channels of retail distribution, inefficient retailers have a very real interest in fending off innovative competitors. And as the Wheel of Retailing theory explains, the inefficient retailer is most often vulnerable to price competition, not because the innovative discounter offers fewer "ancillary services" essential to sell the product, but rather because the inefficient retailer has become accustomed to substantial margins, or because the innovator has achieved greater cost efficiencies,[2] or, most likely, for both reasons.

Thus, a principal method by which inefficient retailers seek to thwart innovative price competition is by inducing consumer product manufacturers to refuse to sell to "discounters." Occasionally these efforts are successful, because some manufacturers are all too ready to embrace resale price main-

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[2] For example, a discount chain such as Target and a small, high margin specialty retailer employ very different approaches to essential aspects of store operation such as merchandise buying and inventory levels, as well as pricing.

tenance,[3] and perhaps because other manufacturers are understandably reluctant to anger long-standing retailer customers. But in recent years, and particularly since Congress repealed the antitrust exemption for state-authorized resale price maintenance in 1975, off-price retailers have had broad access to consumer products, including most "brand name" and many "high fashion" products. Dayton-Hudson submits that, in the last decade, the performance of this intensely competitive and innovative retail marketplace has been good for consumers, good for the economy as a whole, and consistent with the objectives of Federal antitrust laws and enforcement policies.

It is in this context that Dayton-Hudson is strongly opposed to the Government's plea that this Court overrule the *per se* rule against resale price maintenance. From Dayton-Hudson's perspective, the reasons why the Government argues that manufacturers *need* the freedom to impose resale price maintenance simply do not apply to the retail distribution of most consumer products. On the other hand, were resale price maintenance not illegal *per se*, Dayton-Hudson is convinced that many consumer product manufacturers would adopt this anticompetitive device, thereby depriving efficient retailers of the opportunity to provide innovative price competition.

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[3] For example, the President of Phillips Van Heusen Corporation was reported as having said to a recent gathering of the Menswear Retailers of America:

> We [Phillips Van Heusen] fully intend to eliminate any customer of ours whom we classify as an off-price retailer or diverter.

Daily News Record, March 23, 1983, p. 2. Significantly, Phillips Van Heusen is an apparel manufacturer that also operates specialty apparel stores. *See also* Barmash, "Retailers Debate 'Off-Price' Threat," *The New York Times*, June 22, 1983, pp. 29, 32.

The Government's only response to Dayton-Hudson's concerns is to rely upon the rule of reason to deter or to punish anticompetitive types of resale price maintenance. However, Dayton-Hudson believes that the rule of reason would be largely if not wholly ineffective in policing resale price maintenance schemes for the thousands of consumer products. Not only are the rule of reason cases difficult and costly to prosecute, particularly for private plaintiffs, but in addition there is the fact that market "power" in the retail world often turns on subjective factors such as fashion and name that are not conducive to traditional rule of reason economic analysis.

For these reasons, Dayton-Hudson believes that, if this Court adopts the Government's position and eliminates the *per se* rule against resale price maintenance, the practical effect will be a return to the costly, inefficient retail marketplace engendered by the fair trade laws—only now on a nationwide basis. The Government admits that *per se* treatment is appropriate for any anticompetitive practice that "retards innovation," Brief for the United States as Amicus Curiae, at p. 21. Yet this is precisely what will happen if widespread resale price maintenance of consumer products is permitted to stifle the Wheel of Retailing. Because the Government's economic arguments against the *per se* rule are unpersuasive, and because the issue need not be reached in deciding this case, Dayton-Hudson urges the Court to reject the argument advanced in Part II.B. of the Brief for the United States as Amicus Curiae.

SUMMARY OF ARGUMENT

Part II.B. of the Brief for the United States as Amicus Curiae contains a narrow and one-sided summary of the economic arguments concerning the competitive impact of resale price maintenance. In fact, the great weight of economic authority establishes that the case for resale price maintenance rests on unsound economic theory and that the practice historically has been adopted for anticompetitive purposes and has produced anticompetitive effects. Thus, the Government's economic argument for overruling the *per se* rule should be rejected.

Petitioner does not challange the *per se* rule in its Questions Presented to this Court, and the Court of Appeals understandably treated the rule as settled law. This Court need not reach the issue, and should not overrule the *per se* rule on this record, because (i) the Government's economic argument is unpersuasive; (ii) this case does not involve the retail distribution of consumer products, where resale price maintenance would have the most anticompetitive impact; (iii) there is no evidence that legitimate manufacturer interests are inadequately met by this Court's decision in *Sylvania*, which left vertical price fixing subject to the *per se* rule but established a rule of reason test for non-price vertical restraints; and (iv) this well-settled seventy year old principle of antitrust law should only be overruled by the Congress.

ARGUMENT

A. There Is Sound Economic Support for the Per Se Rule Against Resale Price Maintenance

The government has represented to this Court that, "In the case of resale price maintenance, both the economic evidence and the adverse consequences of the opposite course dem-

onstrate that resale price maintenance should not be treated differently from all other vertical arrangements between manufacturers and their distributors."[4] However, an objective review of the petinent economic literature refutes this assertion.

In fact, economic support for resale price maintenance is both recent in origin and narrowly based.[5] This is not surprising, because resale price maintenance (a) has historically arisen out of demonstrably anticompetitive motivations, (b) rests on unsound economic theory, and (c) has, when implemented, produced patently anticompetitive results.

1. Historically, Resale Price Maintenance Has Been Adopted for Anticompetitive Purposes

The motivations of those who have historically favored resale price maintenance have tended to be anticompetitive, strongly suggesting that its results will also be anticompetitive.

> In addition to the harmful *effects* on horizontal competition, the historical record supports the idea that there may be anticompetitive *purposes* as well. The most developed literature concerning the purposes behind manufacturer control of retail prices is in the fair trade area. The history of that area reveals that resale price maintenance under the fair trade laws was virtually everywhere retailer inspired. . . .

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[4] Brief for the United States as Amicus Curiae, at p. 29.

[5] In 1963, a poll of the views of 1200 economists concerning newly proposed resale-price-maintenance legislation resulted in a response of 570 economists opposed to the legislation, one in favor and one inquiry returned without comment. *Villard*, "Opposition to the Quality Stabilization Bill," 55 *American Econ. Rev.* 683 (1965).

> The history of the fair trade laws also makes it relatively clear that once those laws were adopted, the manufacturing component of the marketing system was enlisted as an enforcing agency to further programs in the interest of retail dealers.[6]

In sum, resale price maintenance has historically been a method used by retailers to force unwilling manufacturers to act as enforcers in the protection of high retail margins.[7]

Careful studies substantiate these observations. Resale price maintenance has traditionally had as its "object" to "prevent competitors from using the offer of low prices in the competitive struggle for business, and its method was to induce manufacturers by persuasion, organized threats and by offers of support to introduce and to enforce minimum retail prices for branded goods."[8] In other words, these studies substantiate the notion that inefficient retailers have used resale price maintenance to thwart the process of retailing innovation described by the Wheel of Retailing theory.

2. The Claimed Benefits of Resale Price Maintenance Are Rejected by the Great Weight of Economic Authority

The impetus behind current efforts to rehabilitate resale price maintenance comes primarily from the work of Profes-

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[6] *Andersen*, "The Antitrust Consequences of Manufacturer-Suggested Retail Prices—The Case for Presumptive Illegality," 54 *Wash. L. Rev.* 763, 787 (1979).

[7] *Ibid.*, quoting and relying, *inter alia*, on *Hollander, Restraints Upon Retail Competition* 48-70 (1965); and *Bowman*, "The Prerequisites and Effects of Resale Price Maintenance," 22 *U. Chi. L. Rev.* 825, 849 (1955).

[8] *Bauer and Yamey, Markets, Market Control and Marketing Reform* 297 (1968).

sors (now Judges) Robert Bork[9] and Richard Posner.[10] The Bork-Posner argument is that resale price maintenance can enhance "distributive efficiency."[11] The principal "distributive efficiency" claimed for resale price maintenance is its ability to provide an adequate margin for the dealer to use in providing "ancillary services" for the manufacturer's product.[12]

The fatal flaw in this analysis is its heroic, and entirely unjustified, assumptions (a) that each retailer receiving a large guaranteed gross margin will use it to promote precisely the right amount of service competition, and (b) that, even if he does so, the public interest is best served by greater promotion expenditures rather than lower prices.[13] At least in the world of retailing, quite the opposite conclusion readily commends itself:

> If consumers flock to the low-margin discount houses and shun the small, high margin shops, they must do so because that is what they prefer. To prevent large retailers from pursuing a low-margin strategy, which at bottom

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[9] *E.g., Bork, The Antitrust Paradox* 284-285, 288-290, 292-294 (1978), cited in Brief for the United States, at pp. 25, 27.

[10] *E.g., Posner,* "The Next Step in the Antitrust Treatment of Restricted Distribution; Per Se Legality," 48 *U. Chi. L. Rev.* 6, 9 (1981), cited in Brief for the United States, at pp. 11, 16, 22.

[11] *Bork,* "Resale Price Maintenance and Consumer Welfare," 77 *Yale L.J.* 950, 951-952 (1968).

[12] *E.g., Posner, Antitrust Law: An Economic Perspective* 148 (1976), cited in Brief for the United States, at pp. 17, 21, 25.

[13] As Professors Gould and Yamey carefully explain, the Bork-Posner analysis confuses the manufacturer's self interest, which well may be parochial, with the general economic interest of society. Even if the manufacturer is right about what is best for him, the net effect of his resale price maintenance policy may well be a decrease in consumer welfare. *Gould and Yamey,* "Professor Bork on Vertical Price Fixing: a Rejoinder," 77 *Yale L.J.* 936, 943-944 (1968).

> is what the fair-trade laws seek, is to frustrate the adaptation of distribution channels to meaningful changes in consumer wants and to encourage the perpetuation of obsolete, inefficient channels. . . .
>
> Moreover, the widespread adoption of resale price maintenance tends to deprive consumers of a choice between buying on the basis of service and buying at the lowest possible price. The latter alternative is eliminated unless a substantial segment of the output in each industry is not fair-traded. If there is a genuine consumer demand for service and the other amenities accompanying a high-margin policy, the market will normally support without the coercion of R.P.M. the survival of retailers who satisfy that demand, coexisting with other retailers who cater to the (no doubt much larger) mass of price-conscious consumers.[14]

Moreover it is also apparent that resale price maintenance can have an adverse impact not only on *intrabrand* competition but on *interbrand* competition as well. As Professor Scherer explains:

> . . . vertical price fixing not only eliminates price competition among retailers selling a particular manufacturer's product, but may also dampen interbrand competition. It gives oligopolistic producers firmer control over the prices at which their products are ultimately sold, thereby per-

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[14] *Scherer, Industrial Market Structure and Economic Performance* 592 (2d Ed. 1980). See also Ricci, "Discount Business Booms, Pleasing Buyers, Irking Department Stores," *The Wall Street Journal*, May 3, 1983, pp. 31, 39; *Gerhart*, "The 'Competitive Advantages' Explanation for Intrabrand Restraints: An Antitrust Analysis," *1981 Duke L.J.* 417, 432 (1981).

> mitting them to prevent retail price shading that might induce retaliatory wholesale price cuts by rival manufacturers.[15]

The literature abounds with statements of a similar nature. For example:

> It seems likely that the objective of most dealer services of the promotional variety is the differentiation of the manufacturer's product from that of its competitors. To the extent this effort succeeds, competing products no longer appear to the consumer as effective substitutes and interbrand competition becomes less effective; the product's price increases may be made without fear of significant loss of trade.[16]

Finally, the Bork-Posner analysis fails to recognize the very real possibility that the manufacturer embarks on resale price maintenance not to promote efficiency but as the unwilling victim of what Steiner calls the "Prisoner's Dilemma":

> When the advice of retailers is important in guiding consumer selection, the industry's manufacturers may voluntarily adopt vertical restraints that raise price and reduce industry output without producing any increase in the quality or aggregate quantity of information provided consumers of the industry's goods. This prisoner's dilemma situation, which may be reasonably common,

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[15] *Scherer, supra* n.14, at 593. *See also Gerhart, supra* n.14, at 428-429.

[16] *Andersen, supra* n.6, at 782. To the same effect, see, *e.g., Comanor,* "Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath," 81 *Harv. L. Rev.* 1419, 1427 (1968): "In the end, vertical restrictions not only eliminate intrabrand competition but also, through their effect on product differentiation, will serve to restrict price competition among the products of different firms."

might occur in a proprietary drug category in which individual brands enjoy a degree of consumer recognition and market power, but "special services" (*i.e.*, the pharmacist's recommendation) also influence consumer buying decisions.[17]

3. Empirical Study Has Shown That Resale Price Maintenance Has Anticompetitive Consequences

Observation of the actual effect of resale price maintenance in practice has shown that it leads to economically antisocial consequences. For example, Professor Scherer observes that "the experience of European countries suggests that resale price maintenance retarded the spread of supermarketing; and the pace of innovation in retailing accelerated perceptibly when legalized R.P.M. was abolished."[18]

Bauer and Yamey report that, in England:

> The introduction of resale price maintenance in the various trades involved the raising of resale prices. It is not easy to measure the extent of the increase in prices, although there is evidence that in some cases retail prices went up by as much as a third. . . .[19]

Similarly, Professor Weiss recites:

> The FTC found that after the introduction of fair-trade laws in the 1930's prices charged by department stores and chains were definitely higher but that prices charged by small independents, especially in small towns, apparently were not. An economist who had a commercial re-

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[17] *Steiner*, "Vertical Restraints and Economic Efficiency," FTC Working Paper No. 66, at p. 11 (June 1982).

[18] *Scherer, supra* n.14, at 592.

[19] *Bauer and Yamey, supra* n.8, at 300.

search firm sample posted retail prices of toothpaste in large cities in both fair- and free-trade states found average prices significantly higher in the fair-trade areas. Five years after having prohibited resale price maintenance agreements, the Swedish government surveyed retail prices in four lines of goods and found them averaging below the manufacturers' recommended price in each case.[20]

Professor Scherer summarizes:

> . . . when R.P.M. attains its primary goals it tends in all but special cases to raise retail margins and prices. This has sometimes been denied by advocates, but the weight of the available evidence supports a conclusion that R.P.M. does raise prices. For instance, a 1965 Justice Department survey revealed that the prices of 132 widely fair-traded products were 19 percent lower than the fair trade minimum on the average in eight cities not bound by R.P.M. laws.[21]

Steiner observes that the history of advances in distributional efficiency is characteristically the history of the introduction of new large-scale, low-cost, low-margin retailing techniques, commencing with the department store and progressing through the mail order house, the chain store, the supermarket and the discount store.[22] The new, capital-intensive retailer enters the fray as a price cutter, and the sorely

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[20] *Weiss, Case Studies in American Industry* 251-252 (1967).

[21] *Scherer, supra* n.14, at 592-593.

[22] *Steiner, supra* n.17, at 14-17. *See also* Sharp, "Resale Price Debate Often Lacks Common Sense," *Legal Times*, May 23, 1983, p. 31.

pressed, labor-intensive, high-cost, traditional retailer attempts to fight back:

> In this recurrent scenario, contrary to the Bork-Posner model, vertical restraints are the result not the cause of increased distributional efficiency! They represent a desperate counterattack on the part of the besieged, less efficient elements in the trade to stem or roll back the rising tide of distributional productivity.[23]

Resale price maintenance deprives the efficient merchant of the competitive advantage of his lower costs and facilitates price stabilization at the manufacturer level. "Thus the maintenance of stipulated resale prices by manufacturers works in two ways to stifle competition: (1) by putting high- and low-cost distributors on the same level and (2) by fostering monopolistic pricing among producers of nationally advertised brands."[24]

Vance has summarized the effects of resale price maintenance with force and clarity:

> Not only is the spirit of the Sherman Antitrust Act violated but the very philosophy of free enterprise is threatened. The guaranteeing of a fixed margin over cost assumes a single level of efficiency for all retailers. Since no allowance is made for different cost structures,

[23] *Id.*, at 18. Steiner provides an illustration from the toy industry. In the United States, mass advertising and mass retailing of toys led to increased output, lower margins, lower prices, increased research and development and more product innovation. In Europe productivity and innovation were retarded by resale price maintenance, advertising prohibitions, and the low market share of discount houses. *Id.*, at 23-24. Again, when the Wheel of Retailing is prevented from turning, there are serious adverse consequences for the consumer.

[24] *Stocking and Watkins, Monopoly and Free Enterprise* 323-324 (1951).

> the more efficient merchant cannot pass savings on to the consumer. The excessive markup is in effect a subsidy and a way of perpetuating inefficiency. The remarkable growth in the number of discount houses attests to the unreasonable fair trade margins. The unrealistic price rigidity prevents the movement of slow or overstocked items. Loss-leader tactics also lose significance. If the price maintenance practices were adopted universally, our marketing structure would revert from the flexibility of free enterprise to the rigidity of the "planned" economy.[25]

Surely resale price maintenance, having the pernicious effects described above, must remain unlawful *per se*.

B. This Court Need Not Reach the Issue Raised in Part II.B. of the Government's Brief

It is apparent from the opinion of the Court of Appeals, and from the Questions Presented by Petitioner, that this case has been litigated under the assumption that resale price maintenance, or vertical price fixing, is a *per se* violation of the Sherman Act. Working within that framework, Petitioner has raised important questions concerning what types of conduct constitute vertical price fixing,[26] and the proper relationship between the *per se* rule governing resale price maintenance and the rule of reason analysis mandated for non-price vertical

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[25] *Vance, Industrial Structure and Policy* 248 (1961).

[26] "As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. . . . Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label 'per se price fixing.' That will often, but not always, be a simple matter." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 9 (1979).

restraints under *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

It is not surprising that the parties and the Court below have treated the *per se* rule against resale price maintenance as settled law. Just three years ago, Justice Powell stated for a unanimous Court that, "This Court has ruled consistently that resale price maintenance illegally restrains trade." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980). In the *Sylvania* opinion itself, Justice Powell noted for the majority that, "the per se illegality of [vertical] price restrictions has been established firmly for many years and invokes significantly different questions of analysis and policy." 433 U.S. at 51, n.18. And again last Term, Justice Stevens in a concurring opinion had occasion to observe that resale price maintenance is "subject to different antitrust analysis" than "other vertical restrictions." *Rice v. Norman Williams Co.*, —— U.S. ——, 73 L. Ed. 2d 1042, 1055, n.5 (1982). *See also Albrecht v. The Herald Co.*, 390 U.S. 145, 157 (1968) (dissenting opinion of Justice Harlan).

It is only the United States Department of Justice, appearing as *amicus curiae* in this private antitrust lawsuit, that invites the Court to take this occasion to overrule the seventy year old *per se* rule against resale price maintenance. Of course, Assistant Attorney General William F. Baxter has widely publicized his opposition to this *per se* rule,[27] and his pronouncements have elicited equally strong support for the rule from many sources, including certain Members of Con-

[27] See, *e.g.*, *Resale Price Maintenance—Antitrust Division View*, 5 C.C.H. Trade Reg. Rep. ¶50,442 (Jun. 18, 1982). It may well be that the public "softening" of the Antitrust Division toward this *per se* rule is one reason for the recent increase in the number of vertical price and non-price restraints imposed by manufacturers of brand name apparel products. See, *e.g.*, authorities cited in note 3, *supra*.

gress and State Attorneys General who are also participating as *amici* in this case. Without intending to criticize the Department of Justice for stimulating this debate or for pressing its policy views as *amicus curiae* in private litigation, Dayton-Hudson submits that the Government has simply failed to carry the day on this issue; rather, a variety of factors should persuade this Court to decline to overrule the *per se* rule against resale price maintenance.

First, as outlined in Part II, *supra*, the Government's economic arguments in favor of abandoning this *per se* rule are largely theoretical as well as highly debatable. The Government concedes that "antitrust defendants have not given the Court any occasion to look carefully at the actual competitive effects of resale price maintenance." Brief for the United States, at p. 19, n.27. This is, in effect, an admission that the *per se* rule has worked reasonably well, or at least that there has not been the kind of "continuing controversy and confusion, both in the scholarly journals and in the federal courts," that prompted this Court to reexamine the relatively short-lived *Schwinn* rule. *Sylvania, supra*, 433 U.S. at 47.

Moreover, it is pertinent to note that the current position of the Department of Justice is itself of recent origin. In earlier years, the Antitrust Division was of course the proponent of the *per se* rule it is now attacking, in cases such as *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944). Indeed, more recently, the Antitrust Division has argued for *per se* treatment of even non-price vertical restraints, in cases such as *White Motor Co. v. United States*, 372 U.S. 253 (1963), and *United States v. Arnold, Schwinn & Co.*, 388 U.S. 265 (1967). While there is nothing inherently wrong with the Government rethinking its views on antitrust policy, the

resulting inconsistency greatly weakens the justification for this Court abandoning *stare decisis* and overruling a long-established antitrust rule of law.

Second, Dayton-Hudson submits that this case provides a dangerously narrow factual basis for embarking upon an across-the-board repudiation of the *per se* rule against resale price maintenance. As noted in Part I, *supra*, retailers of basic consumer products function in a different vertical environment than wholesale distributors of agricultural chemicals. The Government's entire economic argument—and the arguments of the economist-judges upon whom the Government most strongly relies—are based upon the distribution problems facing manufacturers who require "ancillary services" from their distributors and who therefore genuinely fear "free riders." In Dayton-Hudson's experience, however, these arguments are simply irrelevant to the retail distribution of basic consumer products. Instead, resale price maintenance in the retail world most often originates with inefficient retailers and thus reflects cartel motives that the Government concedes are anticompetitive and illegal.

Third, Dayton-Hudson submits that there is no credible evidence that manufacturers who require ancillary services from their distributors also need the freedom to impose resale price maintenance. The *Sylvania* decision giving manufacturers greater freedom to impose non-price vertical restraints is only six years old. Assuming that there is a legitimate "free rider" problem, there is no basis for assuming at this time that *Sylvania* was an inadequate answer to that problem. Antitrust defendants constantly attacked the *Schwinn* rule during its ten year life, yet have seldom challenged the long-standing *per se* rule against resale price maintenance. Thus, the infer-

ence that resale price maintenance serves no legitimate competitive purpose is strong.

Moreover, overruling this *per se* rule would pose far greater anticompetitive risks than the Court's decision in *Sylvania*. From Dayton-Hudson's perspective, price-oriented retailers do not like the non-price vertical restraints legalized by *Sylvania*, but they can live with them. On the other hand, there is real doubt that discount and off-price retailing could effectively survive the cartelized world of nationwide resale price maintenance. Thus, the concern expressed by Chief Justice Burger in *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978), is equally present here: that overruling this *per se* rule "would . . . remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby."

Fourth, this Court should not abandon its long-established view that price restraints "involve significantly different questions of analysis and policy." *Sylvania*, *supra*, 433 U.S. at 51, n.18. As Justice Stevens more recently stated in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978):

> Price is the "central nervous system of the economy," United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 226, n.59, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. United States v. Container Corp., 393 U.S. 333, 337.

Dayton-Hudson submits that this is not only long-established antitrust doctrine, but it is also sound competition policy. As McNair's Wheel of Retailing illustrates, innovation—at least in the retail world—does in fact spring from price competi-

tion. Therefore, this Court's historic vigilance in protecting pricing autonomy from the restraints of resale price maintenance is an important cornerstone of Sherman Act enforcement.

Finally, Dayton-Hudson submits that the new-found distaste of the Executive Branch for the *per se* rule against resale price maintenance, and the heated antitrust policy debate which has resulted, present an appropriate subject for resolution by the Congress. As Justice Stevens recently stated in *Arizona v. Maricopa County Medical Society*, —— U.S. ——, 73 L. Ed. 2d 48, 65 (1982), a case which involved another price fixing issue:

> Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business certainty, but also on a recognition of the respective roles of the Judiciary and the Congress in regulating the economy. [Citation omitted.] Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the legislature.

See also Part IV of Chief Justice Burger's opinion for a unanimous Court in *Texas Ind., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 646-647 (1981). Moreover, in this case, there is strong reason to believe that Congress has recently "expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and Mc-

Guire Acts allowing fair-trade pricing at the option of the individual States." *Sylvania, supra*, 433 U.S. at 51, n.18.

CONCLUSION

For all the foregoing reasons, Dayton-Hudson Corporation respectfully urges this Court to decline the Government's invitation to use this case as a vehicle for overruling the *per se* rule against resale price maintenance. Rather, this case should be decided on the important, but narrower, issues dealt with by the parties and by the Court of Appeals.

Respectfully submitted,

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July 1983

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NO. 82-914

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

MONSANTO COMPANY,

PETITIONER

v.

SPRAY-RITE SERVICE CORPORATION,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNDERSIGNED SENATORS AND REPRESENTATIVES AS AMICUS CURIAE

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1/The undersigned senators and representatives do not concern themselves in this brief with the Court's resolution of the two primary questions with which the Court is properly faced and for resolutions of which the Court granted certiorari in this case.

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INTEREST OF SENATORS AND REPRESENTATIVES

As members of Congress, the undersigned senators and representatives are concerned that national antitrust policy be set by Congress and not by executive

decision. The Justice Department's amicus curiae petition for certiorari and brief on the merits advocate changes in the law without legislative approval. The members of Congress hereinafter named have a substantial interest in preserving their legislative prerogative to enact new laws and to amend or repeal existing laws.

STATEMENT

This Court granted certiorari in this case on February 28, 1983. 51 U.S.L.W. 3627 (U.S. March 1, 1983) (No. 82-914). In its *amicus curiae* petition for certiorari,2/ the Department of Justice ("the Department") requested that the Court grant review in this case to reconsider the validity of the 70-year-old rule against resale price maintenance schemes. DOJ *amicus* petition, pp. 13-18. The Department renewed this request in its brief on the merits.3/ DOJ Brief, 19-29. It is that issue, raised for the first time by the Department's petition, to which this brief is addressed.

SUMMARY OF ARGUMENT

The Department's request that this Court change the *per se* rule against resale price maintenance reveals a total

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2/Hereinafter referred to as "DOJ *amicus* petition."
3/Hereinafter referred to as "DOJ Brief."

disregard for the legislative process. First, the Department, as amicus curiae is in no position to raise new issues in this Court that were not raised by the parties either in the lower courts or in this Court. Second, Congress, not the courts, is the proper venue for seeking changes in the law. Further, Congress recently expressed its clear intention to retain the per se rule by the 1975 repeal of the "fair trade" laws that formerly authorized the states to permit resale price maintenance. The Department's attempt to exclude Congress from shaping the Nation's antitrust laws must not be permitted by this Court.

Moreover, the Department simply ignores over forty years of legislative history dealing specifically with resale price maintenance. The Department advocates its narrow view that the achievement of "procompetitive effects" constitutes the sole or primary goal of the

antitrust laws. However, Congress in addressing resale price maintenance issues, has always balanced several diverse and sometimes directly competing goals. Maximization of business freedom, preservation of consumer choice and survival of small business are among the factors balanced by Congress throughout the lengthy legislative history involving vertical price-fixing. The suggestion that resale price maintenance may be justified simply on the basis of alleged "procompetitive effects" which may or may not result from a manufacturer's self-interest is totally unsupported by legislative history or this Court's decisions.

ARGUMENT

I. The Department, as Amicus, Improperly Seeks to Have the Court Reach the Question of the Legal Standard Applicable To Resale Price Maintenance

The Department argues that the Court should reach out to change the _per se_ rule against resale price maintenance, even though this question was not raised by either of the parties in the lower courts or in this Court. The Department, as _amicus curiae_, is not in a proper position to raise new issues in this Court. _Bell v. Wolfish_, 441 U.S. 520, 531, n. 13 (1979); _Knetsch v. United States_, 364 U.S. 361, 370 (1960). In fact, the Department is well aware of this principle, having argued in another context against just such an attempt by _amicus curiae_:

> "But an amicus curiae is not a party to the suit, has no control over it, and must accept the case before the court as it has been framed by the parties. Amicus curiae may not introduce new issues nor resurrect issues abandoned by the parties." Brief for the United States in _McCalpin v. Masson_, No. 82-2318, United States Court of Appeals for the District of Columbia Circuit, p. 41-42.

The Department should not be able to pick and choose as to when it believes that established principles of law should apply. This Court, therefore, should not address the proffered question raised for the first time by the Department's amicus brief.

II. Legislative History Clearly Demonstrates Congressional Intent to Retain the *Per Se* Rule Against Resale Price Maintenance

A. This Court has Previously Acknowledged That the Passage of the Consumer Goods Pricing Act of 1975 Reestablished the *Per Se* Illegality of Resale Price Maintenance

The Department in its *amicus curiae* petition urged this Court to "grant review in this case to consider whether all *vertical* restraints, including resale price maintenance, should be analyzed under the rule of reason." DOJ *amicus* petition, p. 13 (emphasis in original). However, the proper forum for seeking change in the law is Congress,

not the courts. The issue of legislative prerogative presented by the Department's petition and brief is not a new one. As recently as June 18, 1982, this Court addressed itself to the very issue now argued by the Department. In unequivocal language, this Court reasserted the congressional prerogative in connection with maximum price fixing. The members of Congress named herein assert their legislative prerogative in connection with the _per se_ rule against resale price maintenance.

In the earlier case, the Court stated,

> "Our adherence to the _per se_ rule is grounded not only on economic prediction, judicial convenience, and business certainty, but _also on a recognition of the respective roles of the Judiciary and Congress in regulating the economy_. . . .Given its generality, our enforcement of the Sherman Act has required the Court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the

> legislative prerogative to amend the law. The respondents' arguments against application of the per se rules in this case therefore are better directed to the legislature." Arizona v. Maricopa County Medical Society, 102 S. Ct. 2466, 2478-79 (1982). (Emphasis added).

Both resale price maintenance and maximum price fixing have been firmly established as clear antitrust violations. Therefore, this Court should resist the Department's attempt to skirt the legislative process.

Moreover, the Department's attempt to evade this congressional prerogative to amend the law has aroused a strong reaction by the House Judiciary Committee. The Committee's recent approval of the Department of Justice Authorization bill, H.R. 2912, contained a provision which states that no funds appropriated shall be used to

> "overturn or alter the per se prohibition of resale price maintenance, in effect under the Federal antitrust laws." H.R. 2912, Section 14, as reported out of the House Judiciary Committee, May 16, 1983.

The House Judiciary Committee's report on this measure expressed the Committee's serious concern with the Department's actions in the instant case:

> "The Division's amicus intervention in Monsanto Co. v. Spray-Rite Service Corp., No. 82-914 (1983), is particularly disturbing. . . .At the very least, this expansive use of certiorari to accomplish a sweeping revision of the law relating the (sic) RPM indicates an insensitivity to the respective roles of the Congress and the Judiciary in the formulation and application of antitrust policy. More seriously, the Department's conduct in this private matter may prove to be a wholly unjustified allocation of resources in a bold attempt to circumvent the Congress." H.R. 98-181, 98th Cong., 1st Sess. (1983), p. 22 (Emphasis added).

There can be no doubt about the congressional intent regarding resale price maintenance. In 1975, Congress repealed "fair trade" laws that formerly authorized the states to permit resale price maintenance. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, § 2, 89 Stat. 801. This Court has already indicated

in _dicta_ that such repeal represented legislative ratification of the _per se_ rule for vertical price fixing arrangements.

> ". . .Congress recently has expressed its approval of a _per se_ analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending 15 U. S. C. §§ 1, 45(a). No similar expression of congressional intent exists for nonprice restrictions." _Continental T.V., Inc. v. GTE Sylvania, Inc._, _433 U.S. 36, 51 n. 18 (1977)_.

This Court has thus limited its broad mandate to interpret the Sherman Act where there is an "expression of congressional intent" on a particular practice. While the Department cites cases that state the existence of this Court's broad power in other contexts, it cites no authority contrary to the proposition that when Congress has spoken, this Court will allow Congress the "legislative prerogative" to amend the law.

Moreover, the legislative history of the 1975 Act provides extensive evidence to support the Court's conclusion that Congress adopted the *per se* rule prohibiting vertical price fixing. The Senate and House reports as well as floor debate reflect Congress' clear understanding and intention that repealing "fair trade" meant reinstituting the *per se* rule against resale price maintenance. The House report specifically noted that in the absence of the fair trade exemptions,

> "An agreement between a manufacturer and a retailer that the retailer will not resell the manufacturer's product below a specified price is an abvious (sic) form of price fixing. As such it is *per se* illegal under section 1 of the Sherman Act." H. R. Rep. No. 94-341, 94th Cong., 1st Sess. 2 (1975).

Rep. Rodino, a co-sponsor of the bill and Chairman of the House Judiciary Committee and its Subcommittee on Monopoly

and Commercial Law which reported the bill to the House, said in floor debate that:

> "They (the fair trade laws) have aged to the point where they preserve classic restraints of trade, which but for the protective umbrella they provide, would be considered per se violations of the antitrust laws." 121 Cong. Rec. 23659 (1975).

Rep. Seiberling, also a co-sponsor, agreed, adding that the fair trade laws protected practices that "otherwise would have amounted to a per se violation of the Federal antitrust laws." 121 Cong. Rec. 23662 (1975). Rep. Jordan, another co-sponsor, joined the chorus, stating that:

> "Together, (the fair trade laws) constituted special interest legislation that legitimized what, without the exemption granted by those acts, would be per se violations of the antitrust laws." 121 Cong. Rec. 23659 (1975).

B. Congress' Reestablishment of the *Per Se* Rule Against Resale Price Maintenance Revealed a Full Understanding of the Reasons for its Action

The Department concedes that the Consumer Goods Pricing Act of 1975 re-established the per se rule:

> "Both the House and Senate reports on the 1975 legislation indicate Congress' awareness that by repealing the Fair Trade laws, they were remitting resale price maintenance to <u>Dr. Miles'</u> <u>per se</u> ban." <u>DOJ Brief</u>, p. 28, n. 40.

The Department, however, seeks to evade this conceded point by arguing that nothing in the legislative history suggests that Congress intended to "freeze" the practice into the *per se* category. DOJ Brief, *supra*. To the contrary, the statements surrounding repeal of fair trade illustrate the fact that Congress was not merely mouthing mechanical phrases about *per se* illegality. Congress repealed fair trade and reestablished the *per se* rule precisely because of its understanding of the pernicious effect of the practice on our economy. Similarly, if evidence were presented to Congress which

showed that "new learning" revealed positive effects of resale price maintenance that negate its pernicious effects, Congress could change the per se rule in the future. Finally, there have been no actions by Congress since the passage of the 1975 repeal legislation that suggest that this clear expression of intent to retain the per se rule has been weakened over time.

In addition to the numerous specific references to the per se rule, legislative history shows Congress' full understanding and acceptance of the rule in operation. The per se rule is based on the premise that

> "(T)here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the

ousiness excuse for their use." Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958).4/

In repealing the fair trade laws, Congress clearly reflected such an assessment of the "pernicious effect" of resale price maintenance. The Senate report stated flatly that

> "Without these exemptions the agreements they authorize would violate the antitrust laws," and that "(fair trade laws) are, in fact, legalized price-fixing." S. Rep. No. 94-466, 94th Cong., 1st Sess. 1 (1975).

4/Thus, the *per se* rule, which means automatic liability once the fact that the practice has been engaged in has been shown, must be contrasted with the "rule of reason," which requires elaborate analysis to determine

> ". . .whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the Court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to
> (footnote con't)

The House report on the repeal legislation sounded the same theme:

> "Fair trade laws are nothing more than legalized price fixing." H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 5 (1975).

Further, Senator Brooke, the main sponsor in the Senate emphasized that

> "Without these Federal statutes (the fair trade laws), these interstate price-fixing conspiracies would be in violation of the most basic of our antitrust laws--the Sherman Antitrust Act and the Federal Trade Commission Act." 121 Cong. Rec. 38049-50 (1975).

Senator Philip Hart, the Chairman of the Antitrust Subcommittee of the Judiciary Committee, noted that

> "Without fair trade, retailers can charge any price they desire." 121 Cong. Rec. 37557 (1975).

(footnote con't)exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

Senator Hruska, the Ranking Minority Member of the Judiciary Committee -- who chaired 3 of the 7 days of Subcommittee hearings on the legislation -- added that

> "(S)uch laws (fair trade) allow a manufacturer to enter into an agreement with a retailer to set minimum prices at which his identifiable product may be sold--hence legalizing price-fixing." 121 Cong. Rec. 38051 (1975).

In the House, Rep. Hutchinson noted that

> "Upon enactment of this bill it would be a violation of the Federal Antitrust Act for a manufacturer to set a minimum retail price for any item he makes; that would be price fixing." 121 Cong. Rec. 23660 (1975).

Rep. McClory joined the chorus:

> "The enactment of H.R. 6971 would repeal these Federal exemptions and thus invalidate State fair trade laws <u>and the contractual provisions</u> supported <u>by such state laws</u>. 121 Cong. Rec. 23660 (1975). (Emphasis added)

Finally, Rep. Van Deerlin -- the Chairman of the Subcommittee on Consumer Protection and Finance -- added that

> "Without this helping hand from Washington, such price fixing would be illegal under the antitrust laws." 121 Cong. Rec. 23661 (1975).

The Department seeks to escape the force of this clear legislative history by citing the proposition that:

> "(T)he views of some legislators in 1975 concerning the competitive effects of resale price maintenance (do not) offer much assistance in discerning the meaning of a statute enacted 85 years previously." DOJ Brief, p. 28 (footnote omitted).

This statement would be relevant if the intent of the framers of the <u>Sherman Act</u> were in issue. However, the legislative history of the Consumer Goods Pricing Act of 1975 is not being offered as evidence of what the Sherman Act meant in 1890. Rather the history shows what

Congress meant when it most recently acted in passing legislation dealing with resale price maintenance.5/

5/Furthermore, the Department cannot seriously question whether the views of "some" legislators represent the views of Congress as a whole, because the Department concedes on the same page of its brief Congress' "awareness" of its action. DOJ Brief, p. 23, n. 40.

The Department properly admits that "Congress' views about resale price maintenance--and _Dr. Miles_--have varied over the years." DOJ Brief, p. 28, n. 41. That is why it is the most recent legislative act that is most illustrative of Congress' intent. The fact of varying views on the subject over the years also reinforces the principle that Congress, not the Court, should establish antitrust policy in this area.

In _GTE Sylvania_, _supra_, this Court correctly recognized that the passage of the Consumer Goods Pricing Act of 1975 showed Congress' intent to reinstate the _per se_ rule. Given this intent and Congress' active role in shaping resale price maintenance policy over the years, this Court should defer to Congress' intent to retain the _per se_ rule against vertical price fixing.

III. Congressional Consideration of Resale Price Maintenance Has Always Involved a Combination of Broad "Competition" Concerns as Well as Social and Political Concerns

The Department argues that the Court should abandon the per se rule on the theory that

> "(D)isparate treatment of non-price vertical restraints and resale price maintenance makes little sense from the standpoint of antitrust policy, because resale price maintenance in some situations can have procompetitive or neutral effects." Department's amicus petition, p. 14. See also, DOJ Brief, p. 27.

The "procompetitive" effects to which the Department refers stem from the Department's narrow view of "competition" as being whatever the manufacturer thinks is best. As the Department states it,

> "It is our judgment that manufacturers of certain types of products often have legitimate reasons for wishing to control the distribution environment,"

and that if the manufacturer fails to control the distributor,

> "(T)he manufacturer's mis-

take will be punished in the marketplace. Government interference is not needed." Letter, Assistant Attorney General William F. Baxter to Senator Howard M. Metzenbaum, on resale price maintenance, Oct. 5, 1982 at 4.

This argument is illustrative of the Department's repeated attempts to ignore the bases upon which Congress sets its policy regarding resale price maintenance. However, in framing the issue in its brief, the Department reveals the basic flaw in its narrowly conceived viewpoint:

> "Accordingly, a per se rule against resale price maintenance can be justified only if there is some persuasive basis for supposing that the practice reduces output, retards innovation, or, otherwise interferes with Sherman Act goals." DOJ Brief at 21 (Emphasis added). 6/

6/ Congress has acted on the subject of resale price maintenance three times since the original 1890 Sherman Act legislation was passed. Miller-Tydings Act, 50 Stat. 693 (1937) (establishing "fair trade" authorization); McGuire Act, 66 Stat. 631 (1952) (expanding fair trade); Consumer Goods Pricing Act, 89 Stat. 801 (1975) (footnote cont.)

Thus, the Department concedes that a _per se_ rule may be justified if it supports "Sherman Act goals." It is Congress, however, not the Department which sets these goals.

The legislative history of the various actions taken by Congress shows that Congress has considered a wide range of factors in setting resale price maintenance policy. Nowhere in the legislative history is there evidence for the Department's proposition that a manufacturer's view of how to distribute its products is the be-all and end-all of what Congress means by "competition." Rather, the legislative history leads to two totally different conclusions.

First, Congress' idea of competition includes freedom of _all_ participants in the

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(footnote cont.) (repealing fair trade). Therefore, the "Sherman Act goals" referred to by the Department may be inferred from the intent of Congress in its most recent enactment involving resale price maintenance.

distribution process--not simply manufacturers--to react to competitive conditions at their own level of distribution. Competition also includes the freedom of consumers to choose from as wide a variety of products and seller styles as is possible.

Second, Congress has been concerned with maintaining an economic structure that represents a cross-section of the American business system. That is, Congress has expressed its desire to encourage the continued existence of small and medium sized businesses for social and political reasons, even if such a desire is not always coterminous with a manufacturer's self-interest.

A. Congress' Notion of "Competition" Includes More Than a Manufacturer's Self-Interest

Congress has not accepted the Department's narrow view of how the marketplace should work. When it repealed the fair trade laws in 1975, Congress noted other

procompetitive values that would be stifled if manufacturers could dictate resale prices. Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, §. 2, 89 Stat. 101. In Congress' view, competition means retail competition as well:

> "Some retailers prefer to try to enlarge their share of the market by competing vigorously in price--prescisely (sic) the sort of behavior encouraged by our antitrust laws. This competition is stifled by 'fair trading'. " H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3 (1975).

In addition, Congress has always been concerned with the value of competition to the ultimate beneficiaries, the consumer:

> "To the extent that the 'Mom and Pop' retailer charges a higher price because he is providing more services to his customers, consumers should have the freedom to choose between paying more for these services and buying nothing but the unadorned product at a lower price from a competitor." H.R Rep. No. 94-341, 94th Cong., 1st Sess. 4 (1975).

As Senator Brooke of Massachusetts--the prime Senate sponsor of the fair trade repeal bill--stated on the Senate floor:

> "I believe, just as our forefathers believed, that the only means to insure the American consumer a fair deal is to insure that competition, not conspiracy, dominates the retail market. Competition forces <u>retailers, wholesalers, and manufacturers</u> to provide the consumer the most for her or his money. We <u>cannot on the one hand celebrate the beauties of free competition and then squelch it at the moment it benefits the consumers."</u> 121 Cong. Rec. 38051 (1975) (Emphasis added).

This Court should reject the Department's attempt to squeeze the purpose of the prohibition against resale price maintenance into the small box of "manufacturer knows best." A judgment of the competitive effects of a practice -- <u>according to Congress</u> -- requires a balancing of the effects on manufacturers, retailers and consumers.

B. Congress Has Repeatedly Expressed the View That Resale Price Maintenance

Policy Must Consider More Than Economic Factors.

The Department's argument for a narrow view of what the antitrust laws are meant to accomplish ignores what Congress has said and done about resale price maintenance. Congress has been and continues to be concerned with more than simply the views of one school of economics. Congress allowed the states to permit resale price maintenance for a time in order to protect the existence of the small business component of our economic structure. See, e.g., H.R. Rep. No. 1437, 82d Cong., 2d Sess. 2,4 (1952); S. Rep. No. 2053, 74th Cong., 2d Sess. 2 (1937). When Congress repealed fair trade, it did so not because it no longer was concerned with the existence of small business, but because resale price maintenance was an ineffective means to accomplish this socio-political goal. S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 (1975).

When Congress in 1952 expanded the power of the states to allow fair trade, it was well aware of the economic arguments for and against the practice. 7/ It based its decision, however, on other factors:

> "The committee has studied diligently the economic arguments for and against fair trade...However, the committee is ever mindful of the effects on our economic and political institutions that would result from the wholesale destruction of small business concerns.

7/ Congress passed the first of two "fair trade" laws in 1937 with the Miller-Tydings Act, which allowed the states to permit resale price maintenance agreements. Ch. 690, Title VIII, 50 Stat. 693 (1937) (repealed in 1975). In response to this Court's decision in Schwegmann Brothers v. Calvert Distillers Corp., 341 U.S. 384 (1951) (Miller-Tydings Act construed as not authorizing nonsigner provision), Congress in 1952 enacted the McGuire Act, broadening the States' power to allow enforcement of resale price maintenance contracts even against buyers who refused to sign such agreements. Ch. 745, § 2, 66 Stat. 632 (1952) (repealed 1975).

"In this connection, the committee was greatly interested in the testimony of the Federal Trade Commission...the Commission witness, however, was frank enough to state that there were grounds other than economic and legal grounds which might be considered as furnishing valid arguments in favor of federal validation of state fair trade legislation.

First, the Commission witness stated, the maintenance of a strong healthy small-business community is the best bulwark that we have against the growth of collectivism either in the form of fascism or communism. Secondly, the witness' own studies showed that in those communities in which there exists a healthy small-business group, the level of civic welfare and the interest taken by small-business leaders in health, recreation and education tend to be higher than in those communities in which business consists principally of a few concerns owned and operated by distant corporations...

Under all these circumstances, the committee feels amply justified in recommending enactment of H.R. 5767..." H.R. Rep. No. 1437, 82d Cong., 2d Sess. 4-5

(1952) (Emphasis added). 8/

When it determined that resale price maintenance was no longer in the public interest, Congress did <u>not</u> decide that non-economic factors were no longer relevant. Rather, it repealed fair trade because over 30 years of evidence showed that the experiment had failed. For example, the Senate report pointed our that:

> "The traditional argument that fair trade protects the 'Mom and Pop' store from unfair competition is not borne out by statistics. Between 1956 and 1972 the rate of growth of small retail stores in free trade States (including states which repealed 'fair trade' during this period) is 32 percent higher than the rate in 'fair trade' States." S. Rep. No. 94-466, 94th Cong., 1st Sess. (1975).

The very fact that both the Senate

8/ The Senate report on the McGuire Act made no recommendation on the legislation, so there are no corresponding Senate views. S. Rep. No. 1741, 82d Cong., 2d Sess. 1 (1952).

and the House reports on the repeal legislation went to great pains to explain why fair trade was not useful in protecting the small business structure of our economy shows the deep level of concern Congress had with this factor. Thus, repeal of fair trade was not a rejection of the validity of considering noneconomic effects as part of the antitrust policy decision-making process. Rather, it was a rejection of an antitrust exemption for vertical price-fixing as an effective <u>means</u> to accomplish the political objective of keeping a vigorous and healthy small business sector in our economy. The Court should uphold this congressional policy and reject the Department's attempt to exclude noneconomic factors from antitrust analysis.

CONCLUSION

The Department clearly misdirects its request for a change in the law of resale price maintenance to this Court. The overwhelming body of legislative history shows Congress' intent to keep the per se rule in operation as well as its concern with policy matters far beyond the myopic "manufacturer knows best" view urged by the Department. Therefore, this Court should resist the Department's attempt to exclude Congress from the process of shaping the Nation's antitrust laws, and retain the per se rule against resale price maintenance. The Department's suggested change in the law, if there is to be one, should be made at the legislative level.

Respectfully submitted,

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No. 82-914

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MONSANTO COMPANY,
Petitioner,
v.

SPRAY-RITE SERVICE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION IN SUPPORT OF REVERSAL

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BRIEF AMICUS CURIAE OF NATIONAL AGRICULTURAL CHEMICALS ASSOCIATION IN SUPPORT OF REVERSAL [1]

INTEREST OF AMICUS CURIAE

The National Agricultural Chemicals Association ("NACA") is a non-profit membership corporation organized under the laws of the state of Delaware to further the interests of its members. Practically all of the major domestic producers and formulators of pesticides and herbicides—including Petitioner Monsanto Company—are NACA members. Together, NACA's 105 member companies produce or formulate roughly 90% of the pesticides (including herbicides) used in this country.

The central issue in this case is the extent to which manufacturers of agricultural chemicals and other prod-

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[1] This brief is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The written consents have been filed with the Clerk of the Court.

ucts may safely employ pro-competitive, non-price vertical restrictions in distributing their products. NACA member companies will be directly and substantially affected by the Court's resolution of this issue.

Many NACA member companies sell their agricultural chemical products through independent distributors. Together, these NACA members account for a preponderance of the agricultural chemicals that are sold in this fashion domestically. Many NACA manufacturing members share Monsanto Company's interest in competing vigorously by ensuring an acceptable level of effort from its distributors. All value their freedom to fashion effective distribution programs without unreasonable antitrust exposure. Accordingly, NACA has a vital interest in submitting a brief to the Court addressing the legal issues raised by this case, without, however, addressing the factual disputes between the parties.

SUMMARY OF ARGUMENT

The basic problem posed in this case is the need to give reality to this Court's ruling in *GTE Sylvania* that vertical non-price restrictions may have pro-competitive justifications that render them lawful under the "rule of reason." [2] If vertical *price* agreements remain subject to the traditional rule of *per se* illegality, the Court will have to consider other approaches to protecting the integrity of *GTE Sylvania* and the ability of manufacturers safely to employ pro-competitive, non-price vertical restrictions. The reason, which is discussed further below, is straightforward: if "price" agreements are too broadly defined or too readily found, *GTE Sylvania* is thoroughly undermined.

In Section I of this brief we sketch some of the real-life business circumstances that should shape this Court's effort to harmonize rule-of-reason treatment of non-price

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[2] *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54, 58 (1977).

vertical restrictions with *per se* prohibition of resale price-fixing. In the context of restricted distribution systems validated by *GTE Sylvania*, these circumstances include the inevitability, and indeed desirability, of frequent communication between the manufacturer and its distributors about all matters of concern, including prices, and the fact that the manufacturer's implementation of non-price restrictions will inevitably affect distributors' ability to engage in intrabrand price competition.

Section II of the brief deals principally with the appropriate standards of proof that should be met by a price-cutting distributor claiming that his termination by the manufacturer was "pursuant to a conspiracy with other distributors to fix the resale price" of the product. (Pet. A-17.) Here we show that if *GTE Sylvania* is to have practical reality, the distributor should not recover unless he offers convincing evidence (i) excluding the possibility that the manufacturer, in terminating the distributor, was enforcing reasonable non-price restrictions and (ii) establishing that other distributors were in fact adhering to minimum resale prices because of agreements or threats of termination.

In Section III we assume that vertical "price" agreements have been properly proved, and we discuss the kinds of agreements that should be excluded from the scope of the *per se* rule if *GTE Sylvania* is not to be undermined. We conclude that the *per se* rule should not apply to price or price-affecting agreements that are intrinsic or reasonably ancillary to valid non-price restrictions. We also discuss the danger to *GTE Sylvania* from too readily finding an unlawful "vertical-horizontal" conspiracy from collective actions by distributors connected with a manufacturer's enforcement of distributional restraints. Finally, we note that reasonable non-price restraints should not be rendered illegal *per se* by the presence in the same distribution system of unlawful resale price maintenance agreements.

ARGUMENT

I. The Economic Realities of Restricted Distribution Should Guide This Court's Effort To Harmonize the Principles of *GTE Sylvania* with the Traditional *Per Se* Rule Against Resale Price Maintenance.

In legal theory, a manufacturer could institute and operate a restricted, or "franchised," distribution system without any communication to or from its distributors or franchisees, existing or prospective, concerning the operation of the distribution system. In practice, this cannot be expected to happen, and for perfectly legitimate reasons. Maximizing efficiency in distribution, like rational economic planning in general, depends on the manufacturer's maintaining a flow of the best available market information, of which distributors are an important source. Efficient distribution is a cooperative enterprise, and it is not only inevitable, but affirmatively desirable, that there be communication between a manufacturer and its distributors, and that they exchange views on the common problems arising from the operation of the distribution system.

Some of those common problems will almost certainly relate to the pricing of the products involved. As this Court recognized in *GTE Sylvania*, intrabrand price effects are intrinsic to non-price vertical restraints. When a manufacturer elects to limit the number of distributors to whom he will sell, or to impose territorial or customer restrictions on the distributors, he directly limits the number of intrabrand competitors to whom any particular buyer can turn. Similarly, manufacturer-imposed requirements that distributors perform promotional and other services necessarily lead to nominally higher prices to consumers by imposing higher costs on distributors. Such limitations on intrabrand competition and consequent price effects make it possible to achieve the distribu-

tional efficiencies and the level of distributor-supplied services that the manufacturer can legitimately seek. As Judge Posner has observed, "[t]he adoption of a restricted distribution system implies a decision to emphasize non-price competition over price competition, which such a system tends to suppress." [3]

A related and highly relevant point is that a distributor who disregards non-price restrictions, or a would-be distributor denied supplies by resale restrictions on franchised distributors, will often be a price discounter. The distributor who sells outside his assigned territory, and/or fails to provide promotional or other services desired by the manufacturer, will normally have to undercut the price charged by other distributors; buyers have no reason to pay the same price to a distant, less convenient seller or to one not providing services that its competitors supply. In short, disregard of non-price restrictions or obligations will commonly be accompanied by discounting.

Finally, the manufacturer's hostility toward the non-performing (and price-cutting) distributor will naturally be shared by affected distributors who are abiding by the manufacturer's non-price restrictions or obligations. It should hardly be surprising if distributors complain, and legitimately, about the price-cutting distributor who invades their territories; who sells to unfranchised distributors who in turn heavily discount the resale price; or who they have reason to believe, because of the depth of the price-cutting, is "free-riding" and not providing the costly services that they supply at the manufacturer's behest. And, of course, the fact of price-cutting will not go unmentioned.

As the instant case and others have shown, these economic realities of restricted distribution systems raise the danger that the manufacturer legitimately seeking to

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[3] *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 743-44 (7th Cir. 1982).

implement pro-competitive non-price restrictions will be held to have participated in an unlawful conspiracy to fix the distributors' resale prices. The principal antitrust pitfalls are as follows:

(1) Termination of a price-cutting distributor following complaints by competitors may be held sufficient, as in the instant case (Pet. A-5 - A-9), to establish that the termination was the product of an agreement or "concerted action" between the manufacturer and the complainants.

(2) The same facts may be held sufficient, as in the instant case (Pet. A-14 - A-17), to establish that the manufacturer and the complaining distributors were engaged in a *per se* unlawful conspiracy to maintain resale prices.

(3) Refusal of the manufacturer and other distributors to supply the terminated distributor may be characterized, again as in the instant case (Pet. A-9 - A-11, A-18), as a *per se* illegal "boycott."

(4) Communication among distributors before or during complaints to the manufacturer may be held to establish an unlawful "horizontal" agreement, to which the manufacturer becomes a party by terminating the offender.[4]

The protection provided by *GTE Sylvania* to the non-price restraints inherent in restricted distribution systems is undermined, if not eradicated, by legal risks of this sort. The result is to inhibit employment of efficient distribution systems benefitting manufacturers and consumers alike. Harmonization of the traditional prohibition of resale price maintenance with *GTE Sylvania* requires both (1) more careful rules as to the standard of proof of vertical price "agreement" under Section 1, and (2) more precise delineation of the kinds of vertical "price" agreements that fall within the traditional *per se* rule.

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[4] See the discussion in III-B, *infra*, of *United States v. General Motors Corp.*, 384 U.S. 127 (1966).

II. The Court Below Misunderstood the Appropriate Standard of Proof of Vertical Price Agreements To Be Applied in the Context of a Restricted Distribution System.

The court below seriously undermined the principles of *GTE Sylvania* by treating evidence of distributor complaints about price-cutting followed by termination as sufficient to establish an agreement to terminate for price-cutting, and by holding that proof that a manufacturer terminated a distributor because he was a price-cutter was sufficient to establish a resale price-fixing conspiracy between the manufacturer and other distributors. In this section of our brief we deal with these two errors in turn.

A. Termination of a Price-Cutting Distributor Following Complaints About the Price-Cutting Does Not Establish an Agreement To Terminate for Price-Cutting.

Contrary to the view of the court below (Pet. A-15), proof that one or more distributors in a restricted distribution system complained to the manufacturer about the price-cutting activities of another distributor, followed by the manufacturer's termination of that distributor, is plainly *not* sufficient to establish that the termination was the result of, or pursuant to, an agreement or "concerted action" between the manufacturer and the complaining distributors.

There is no such agreement where the manufacturer terminates a distributor for his own independent reasons, and the fact that the termination followed complaints does not prove that such independent reasons were lacking. To assume a causal link between complaints and subsequent termination is to commit the *post hoc, propter hoc* fallacy—the rooster's notion that the sun comes up because he crows before dawn. The complaints may simply be the source of information, which, had the manu-

facturer obtained it in other ways, would have led to the same result. Where that is the case, it makes no difference what the manufacturer's reason is, whether it be the failure of the dealer to engage in desired promotional activities, to abide by non-price restrictions, or to refrain from price-cutting activities.[5] Whatever bearing termination for price-cutting may have on whether an unlawful resale price maintenance scheme exists (*see* II-B and III-A-3 below), the mere fact that termination follows complaints does not prove that the manufacturer agreed with complainants to take such action.

Even if a termination may be said to reflect an "agreement" with other distributors, proof that the terminated dealer was a substantial price-cutter and that termination followed complaints does not demonstrate that the agreement was a "price-fixing" agreement or conspiracy. Suppose that a manufacturer, in imposing legitimate servicing and promotional obligations on his distributors, has explicitly assured them that he will terminate any distributor who fails to comply. It is perfectly reasonable for the distributors to ask for such assurance, as they could not both provide the required services and meet the prices charged by one who does not, and thus it is perfectly reasonable for the manufacturer to give it. That the defaulting distributor who is terminated was also a price-cutter does not convert the "agreement" into a "price-fixing" agreement.[6]

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[5] Nor does proof that complaining distributors have communicated among themselves before or during the course of making their complaints support an inference that the subsequent termination reflected agreement between them and the manufacturer. The complaints may still be nothing more than a source of information that would have led to termination in any event.

[6] Moreover, contrary to the court below (Pet. A-9 n.4), such an agreement cannot, consistently with *GTE Sylvania*, be characterized as a *per se* unlawful concerted refusal to deal. *See* III-A-1, *infra*. Whether an "agreement" to terminate for price-cutting is sufficient to invoke the *per se* rule is further explored in III-A-3 and III-B, *infra*.

In any event, since disregard of non-price restrictions and substantial discounting commonly go together, and since distributors can properly complain to the manufacturer about what they believe to be free-riders' violations of non-price obligations or restrictions, it is clear that *GTE Sylvania*'s protection of legitimate non-price restraints becomes an illusion if a terminated distributor can establish an unlawful conspiracy merely by proving that the termination followed other distributors' complaints about his price-cutting. Such proof establishes neither the reason for termination nor that the termination was the product of agreement. A manufacturer, after all, has no control over the wording of its distributors' communications to it or among themselves, nor can it be expected that they will complain, and the manufacturer will terminate, without mention or thought of price.

Thus, if we are to protect the manufacturers' right to pursue such a legitimate distribution system, proof of an agreement to terminate for price-cutting must consist of more than facts that might commonly occur within that distribution scheme. At the least, a plaintiff seeking to show that his termination was the result of an unlawful conspiracy to eliminate price competition must negate the alternative hypothesis—at least equally likely—that the manufacturer was following a policy of enforcing non-price obligations. The minimum proof on this point required of the plaintiff distributor should be solid evidence that either (1) the plaintiff was in full compliance with the non-price restrictions imposed on him and therefore the complaints about his discounting furnish the only apparent explanation for his termination, or (2) although plaintiff was not in compliance with all non-price restrictions, the manufacturer knowingly did not terminate other non-price-cutting distributors who similarly failed to comply and, again, the complaints about his discounting are the only apparent reason for the manufacturer's decision to terminate him. Any lighter burden

of proof would undermine *GTE Sylvania* by subjecting the manufacturer to unacceptable risks in attempting to operate a lawful system of restricted distribution.[7]

B. Proof that a Manufacturer Terminated a Distributor Because He Was a Price-Cutter About Whom Other Distributors Complained Does Not Establish a Conspiracy To Eliminate or Reduce Resale Price Competition.

The holding of this court in *United States v. Colgate*, 250 U.S. 300 (1919) must, as an irreducible minimum, mean that the unilateral action of a manufacturer in terminating a distributor is not covered by Section 1 of the Sherman Act, regardless of his reasons. By definition, there is no agreement between the manufacturer and the distributor terminated for price-cutting—termination reflects lack of agreement. Accordingly, absent proof of horizontal agreement among distributors on resale price, to establish the element of agreement there must be proof of vertical agreements between the manufacturer and the other, complaining distributors.

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[7] Even in cases alleging horizontal agreements, where communications among competitors are properly viewed with suspicion, plaintiffs must show more than "consciously parallel" actions plus the opportunity (at trade association meetings or otherwise) to collude. Since parallel actions may be consistent with independent decisions that each competitor would have made regardless of what the others did, plaintiffs must adduce evidence showing that they were consistent with individual self-interest only if all acted the same way. *E.g., Proctor v. State Farm Mutual Automobile Insurance Co.*, 675 F.2d 308, 334 (D.C. Cir.), *cert. denied*, 103 S. Ct. 86 (1982); *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976); *Venzie Corp. v. United States Mineral Products Co.*, 521 F.2d 1309, 1313 (3d Cir. 1975). The case is even stronger for requiring a terminated distributor claiming a vertical price-fixing conspiracy to show more than that competitors complained to the manufacturer of his price-cutting. As we have pointed out, communications between a manufacturer and his distributors are a valuable source of information necessary to the implementation of legitimate non-price restraints.

Adequate proof that *one* distributor was terminated for price-cutting and not for failure to adhere to non-price restraints, while it is of course evidence of the manufacturer's concern with resale prices, does not by itself establish agreement by *other* distributors that they will abide a price floor. In order to make out such agreements, there should be, at a minimum, proof (1) that the manufacturer communicated to its other distributors its desire that they sell at suggested minimum resale prices (or that they not sell below some specific discount); (2) that the manufacturer explicitly or by strong implication threatened them with termination (perhaps by holding up the example of the terminated distributor) if they did not follow his desires; *and* (3) that many if not most did adhere to the minimum resale prices desired by the manufacturer.

In this connection, Monsanto's Petition for Certiorari states as follows:

> With rare exceptions, respondent and all other Monsanto distributors sold below—often substantially below—Monsanto's suggested resale prices. . . . One of respondent's witnesses testified that 'price cutting was a way of life with distributors.' . . . It is undisputed that no distributor ever changed its resale prices as a result of any alleged pressure by Monsanto, . . . despite contradicted evidence that Monsanto threatened respondent and one other distributor with termination. (Pet. at 6-7.)

If this is a correct summary of the record, there were no resale price maintenance agreements proved in the instant case even if Spray-Rite had been terminated "because" it was a price-cutter and not because of its failure to satisfy Monsanto's non-price distributorship criteria.

Nor does proof that other distributors complained to the manufacturer about the terminated distributor's price-

cutting supply the necessary additional evidence. Superficially considered, these complaints might be thought to suggest that the other distributors have been parties to a resale price maintenance scheme. But that is not the only or even the most likely inference where a system of restricted distribution is involved. The other distributors' complaints may merely indicate their distress over a competitor charging prices lower than they, who are dutifully supplying costly services, can profitably charge, and their request that the manufacturer do something about it. There is no reason to hold, or even suggest, that such complaints alone make them parties to an unlawful conspiracy.

III. Vertical "Price" Agreements Intrinsic or Reasonably Ancillary to Valid Non-Price Restrictions Should Be Excluded from the Rule of *Per Se* Illegality, As Should "Vertical-Horizontal" Price-Affecting Agreements Arising in the Course of a Manufacturer's Operation of a Valid Restricted Distribution System.

The threat posed to *GTE Sylvania* by this and similar cases cannot be adequately resolved solely by rules regarding the proof necessary to establish conspiracy or agreement. A limited distribution system by its nature rests on a web of agreeemnts, and actions taken pursuant to them will inescapably have price effects. Consequently, the more critical task is to determine, in light of *GTE Sylvania*, what kinds of "resale price agreements" are or are not to be deemed illegal *per se*. In addressing this issue, it may be useful to begin with some general observations concerning *per se* rules.

Strictly speaking, a rule of *per se* illegality means that an agreement is illegal without more. No other facts need be proved or considered. No proof is required of market power or of actual market effects, and no justifications

will be accepted. As this Court has often said, the severity of such a rule dictates that it be adopted only when the economic support for it is clear.[8] Thus, even in the area of horizontal agreements, the *per se* rule does not apply to all agreements with price effects.

For example, agreements to disseminate price and other market information through trade associations or other organized channels are not *per se* illegal, despite the fact that such dissemination—by providing information not otherwise available—inevitably affects the prices charged by individual sellers or paid by individual buyers. The reason is plain: dissemination of information, as in an organized stock exchange, may improve the competitive performance of the market.[9] Agreed-upon dissemination of price information becomes unlawful only when an analysis of market structure, other market facts, and the details of the information disclosed, indicates that reduction of price competition is the likely effect.[10]

Even a "horizontal" agreement on price may be lawful if reasonably ancillary to a lawful joint venture, such as a joint venture formed by competitors to enable them to enter another market that they individually could not efficiently reach.[11] And in its recent *BMI* decision, this Court held that an agreement among competitors on the price to

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[8] *E.g., GTE Sylvania*, 433 U.S. at 49-50; *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979).

[9] *Maple Flooring Manufacturers Ass'n v. United States*, 268 U.S. 563, 582-83 (1925).

[10] *E.g., United States v. Container Corp. of America*, 393 U.S. 333 (1969); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

[11] The ancillarity principle was set forth as early as *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

be charged for a collective product offering does not invoke the *per se* rule. The Court prefaced its analysis with the following comments:

> . . . "[P]rice-fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable . . . . [A] literal approach does not alone establish that . . . [a] particular practice is one of those types. . . . *Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price-fixing."* [12]

Care in limiting the scope of the *per se* rule on vertical resale price-fixing is *a fortiori* required. In holding that territorial and customer restrictions on distributors are to be treated under the rule of reason, the Court in *GTE Sylvania* recognized that vertical restrictions are inherently less productive of anticompetitive effects than horizontal agreements. In so doing, the Court completely eliminated one half of the parallel to horizontal restraints, for horizontal agreements among competitors to divide territories or to allocate customers, like horizontal price-fixing agreements, are illegal *per se*.[13] The same more favorable regard for vertical restrictions, even if it is not taken to compel the conclusion that all vertical price-fixing should be treated under the rule of reason (433 U.S. at 51 n.18), at least suggests that the kinds of vertical "price" agreements subject to a *per se* rule should be very carefully defined.

Following that approach, we now turn to the kind of agreements "fixing" or otherwise affecting resale price that are properly excluded from the scope of the *per se* rule.

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[12] *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 9 (1979) (emphasis added).

[13] *E.g., White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

A. The Rule of Reason Should Apply to Agreements Involving Price Effects That Are Intrinsic or Reasonably Ancillary to Non-Price Restrictions.

1. *Agreements with price effects intrinsic to non-price restraints.* As recognized in *GTE Sylvania*, price effects are intrinsic to various non-price restrictions and to actions taken to implement or enforce them. The inevitable effect of many non-price restrictions is to reduce the number of distributors of a product to whom particular buyers may turn. Termination of the price-cutting distributor who has failed to abide by non-price restrictions or obligations necessarily raises the price to buyers who have patronized him, at least in the short run. Agreements preventing wholesalers from selling to other than franchised retailers, and agreements preventing franchised retailers from selling to other than consumers, inevitably keep the manufacturer's product from getting into the hands of likely discounters.[14] *GTE Sylvania* clearly requires that all such agreements, in which price effects are indirect but intrinsic, be exempted from the rule of *per se* illegality.

In this connection, while petitioner has not raised the issue here, we believe it to be appropriate for the Court to repudiate the ruling below that an agreement among a manufacturer and remaining distributors to refuse to supply product to a terminated dealer is a *per se* illegal boycott. Respondent, in its brief in opposition to the petition for certiorari, makes much of this holding, using it to buttress its claim that a price-fixing conspiracy among the manufacturer and its distributors had in fact occurred. But proof of a "concerted refusal to deal" with a terminated distributor adds nothing to an understanding of

[14] Similarly, the manufacturer who elects to deal only with "prestige" retail outlets, on the understanding that conversion to a "discount"-type of operation will lead to termination, has created a distribution system in which higher prices will be charged than would otherwise be the case.

why the manufacturer terminated the distributor or what, if any, agreements there may have been between the manufacturer and other distributors with respect to resale prices.

As we have noted, an agreement by distributors with the manufacturer that they will not sell to unauthorized outlets is intrinsic to a limited distribution system. If such agreements were forbidden as "boycotts," a manufacturer could create a limited distribution system only by vertical integration. For many products, and for many small manufacturers, vertical integration is not feasible; and even where it is, it would make no sense to force a manufacturer to go that route when in his judgment independent distributors could do the job more efficiently.[15] Similarly, if agreements by distributors not to deal with parties not authorized to participate in the distribution system were taken as evidence of other, unlawful agreements, restricted distribution systems would be saddled with unwarranted legal risks.

2. *Price agreements clearly ancillary to non-price restrictions.* As noted above, it is a familiar proposition that an agreement that would be unlawful standing alone (a "naked" restraint) may be lawful if ancillary to some other valid business arrangement. Without attempting to canvass all of the possibilities, we furnish two examples of agreements directly dealing with resale price that are clearly ancillary to non-price restrictions and should accordingly be treated under the rule of reason.

The first example is found in *Eastern Scientific*, where the First Circuit upheld, against a claim of *per se* illegality, a contractual restriction preventing dealers from selling outside their defined territories at less than a minimum price specified by the manufacturer.[16] The court

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[15] *Compare GTE Sylvania*, 433 U.S. at 56 n.25, and at 57 n.26.

[16] *Eastern Scientific Co. v. Wild Heerbrugg Instruments, Inc.*, 572 F.2d 883, 886 (1st Cir.), *cert. denied*, 439 U.S. 833 (1978).

reasoned that this restriction could not have a greater anticompetitive effect than an absolute territorial limitation, and that it was therefore lawful if the latter would pass muster. The result could also have been justified on another ground, namely that the "minimum price" provision in fact served as a maximum price check, because any distributor who charged above that price would lose sales to distributors from adjacent territories. In other words, it enabled the manufacturer to achieve the efficiencies and other legitimate purposes derivable from territorial limitations, and at the same time prevent territorially protected distributors from abusing their position by charging too high a price.

The second, and related, example of clearly ancillary vertical price agreements is a manufacturer's restriction on the maximum resale prices charged by distributors participating in a system of restricted distribution. This example leads, of course, to the proposition that *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), extending the rule of *per se* illegality to vertical maximum resale price maintenance, should be expressly overruled.[17] The ban on maximum resale price maintenance impedes a manufacturer's ability to implement, with full advantage to consumers, the kind of beneficial non-price restrictions which *GTE Sylvania* endeavored to protect.

Albrecht itself was a classic example. Exclusive distribution of newspapers has obvious cost savings; it is highly inefficient to have two or more distributors driving trucks and sending newsboys over the same streets. But if the only paper in town grants exclusive territorial distribution rights, the distributor will in all likelihood take advantage of its position by charging a high resale price, to the disadvantage of the newspaper, which thereby loses

[17] The Court may have taken a step in this direction in *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S. Ct. 2466, 2475 n.18 (1982), when it noted in discussing *Albrecht* and *Kiefer-Stewart* that "horizontal restraints are generally less defensible than vertical restraints."

sales, and of the consumers, who pay more than they would pay with a markup closer to distribution cost. Maximum resale price maintenance enables the publisher to achieve the efficiencies of exclusive distribution and at the same time insure that the cost savings will be passed on to consumers.[18]

3. *Price agreements reasonably ancillary to maintaining an effective distribution system.* We turn now to a more difficult case that comes closer to the core of the *per se* rule against minimum resale price maintenance. A manufacturer may determine that a limited distribution system is necessary to facilitate the provision of services and other forms of non-price competition that will make it a more effective interbrand competitor. At the same time, it determines that within each wholesale or retail territory, it is best served by having a substantial number of distributors, both to provide locational convenience for all buyers and to have sufficient price competition to keep the distributors on their toes. In other words, it would not elect to set absolute minimum resale prices even if the law permitted it to do so. Nevertheless, it remains legitimately concerned that resale prices not fall to the point that the bulk of its distributors could not profitably handle its product and still provide the services that it desires. Accordingly, its concern with resale prices charged by particular distributors appears reasonably ancillary to the implementation of non-price restrictions and obligations that may be lawful under *GTE Sylvania*.

As we have earlier pointed out, the *per se* price-fixing rule is not implicated if a terminated distributor was failing to provide the required services. Nor is it implicated

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[18] *Albrecht* can be read as not foreclosing the defense of "ancillarity" set forth above. In *Albrecht* the Court declined to accept the publisher's claim that its maximum price-fixing conduct was necessary because the publisher had failed to offer evidence of the existence of exclusive territories, their reasonableness, or the economic power over price they placed in the hands of the distributors. 390 U.S. at 153.

by the termination itself, which is accurately characterized as the manufacturer's unilateral response to the market facts confronting it. The problem arises if the manufacturer's actions lead to an understanding by the distributors that excessive price discounting must be avoided, as it then may be plausibly argued that there are vertical agreements to abide by some resale price floor, distinct or indistinct.

A good case can be made for the proposition that a manufacturer should be permitted to offer the facts set forth above as a defense to a claim of *per se* illegal resale price maintenance. The case is narrow in scope and effect. It can arise only where there is provable jeopardy to a distribution system; it involves selective circumstances particularized to a manufacturer's specific distribution system and goals and the ability of its distributors to perform services; and any flash point of the manufacturer's pricing concern will likely be well below the pricing point the distributors would choose through a horizontal cartel. Such a limited concern with resale pricing is of course much less restrictive of intrabrand or interbrand competition than rigid enforcement of the manufacturer's specified minimum resale price (or, indeed, of a system of closed, exclusive territories that might be upheld under the rule of reason). And in terms of ancillarity, it is arguably no more restrictive than is necessary to meet the legitimate objectives that *GTE Sylvania* viewed with favor.

Moreover, such actions do not raise one of the principal dangers posed by minimum resale price maintenance, namely that it may be employed by manufacturers in a concentrated industry as a device to facilitate the suppression of price competition among the manufacturers themselves.[19] Adherence to a horizontal price stabilization

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[19] *See, e.g.*, "Resale Price Maintenance—Antitrust Division View," 5 Trade Reg. Rep. (CCH) ¶ 50,442 at 56,013 (August 17, 1982) (Letter from Assistant Attorney General Baxter to Congressman McClory).

scheme depends heavily on the ability of the competing manufacturers to detect each other's price cuts. If detection is difficult or long-delayed, firms with excess capacity are strongly tempted to make a secret price-cut, as it will generate substantial additional sales before the competitors realize what has happened. If, on the other hand, detection is quick, the manufacturer who makes the cut cannot hope to gain from it because it will be immediately matched. Distribution through independent distributors complicates the detection problem. Without manufacturer-specified resale prices, competing manufacturers cannot know whether a distributors' price cut on one manufacturer's product was made on the distributor's own initiative or was the result of a secret discount on the manufacturer's price to him. Where, however, each manufacturer specifies his distributors' resale price, a price cut by one manufacturer can be readily identified. In short, limited intervention in resale pricing, leaving a substantial degree of distributor pricing freedom, does not serve the anticompetitive purpose of facilitating reduction of price competition at the manufacturers' level.

We recognize that the suggested distinction is not without problems. There may be close cases where the line is difficult to draw. On the other hand, it should be fairly readily determinable, in the probably few cases where the issue would need to be reached, whether or not there has been active competition on resale prices. In any event, this Court's prior decisions do not appear to have foreclosed the question. The Court's decisions dealing directly with vertical resale price maintenance have been cases in which the manufacturer, by contract or by coercion, has endeavored to compel distributors strictly to abide by minimum resale prices set by it.[20]

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[20] *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911); *United States v. Schrader's Son*, 252 U.S. 85 (1920); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436 (1940); *United States v. Univis Lens Co.*, 316 U.S. 241 (1942); *United States v. Park, Davis*

B. "Vertical-Horizontal" Agreements That Affect Price Should Be Assessed Under the Rule of Reason When They Arise Out of the Operation of a Lawful System of Restricted Distribution.

Even if, as urged in Section III-A above, it were made clear that the protection of *GTE Sylvania* extends to vertical "price" agreements inherent in or ancillary to lawful non-price distributional restraints, that protection would be undermined if a finding of "vertical-horizontal" conspiracy were allowed too readily to lead to *per se* condemnation of otherwise legitimate vertical restraints. The dangers are graphically illustrated by *United States v. General Motors Corp.*, 384 U.S. 127 (1966), where the collective efforts of GM and its franchised Los Angeles dealers to stop sale of cars by the dealers to or through non-franchised "discounters" was found to be a *per se* unlawful "combination or conspiracy."

The result might have been rested on the ground—hinted at in the opinion—that the company's efforts to stop the practice were attributable to concerted pressure by the dealers, not its own business determination that the restrictions would serve its interest in efficient procompetitive distribution. This Court so characterized the rationale when in *GTE Sylvania* it described the *GM* case as involving "restrictions originating in agreements among the retailers." (433 U.S. at 58 n.28.)

The opinion in *General Motors*, however, goes much further. The following passages are particularly pertinent:

> General Motors sought to elicit from all the dealers agreements, substantially interrelated and interde-

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& Co., 362 U.S. 29 (1960). Less than rigid resale price-maintenance may have been involved at the retailing level in *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 (1944), but the illegality of the resale term (obligating retailers to "maintain prevailing local price schedules") was conceded on appeal and therefore not before the Court. 321 U.S. at 715, 719.

pendent, that none of them would do business with the discounters. These agreements were hammered out in meetings between non-conforming dealers and officials of General Motors' Chevrolet Division, and in telephone conversations with other dealers. It was acknowledged from the beginning that substantial unanimity would be essential if the agreements were to be forthcoming. And once the agreements were secured, General Motors both solicited and employed the assistance of its alleged co-conspirators in helping to police them. . . . This process for achieving and enforcing the desired objective can by no stretch of the imagination be described as "unilateral" or merely "parallel."

* * *

Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act. . . . [W]here businessmen . . . deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct.

* * *

We note, moreover, that inherent in the success of the combination in this case was a substantial restraint upon price competition—a goal unlawful *per se* when sought to be effected by combination or conspiracy. . . . And the *per se* rule applies even when the effect upon prices is indirect.

* * *

[I]t is conceded that General Motors is intensely concerned that each of its dealers has an adequate "profit opportunity", a concern which necessarily involves consideration of the price realized by dealers.[21]

Absent proof that imposition of such resale restrictions was coercively extracted from a reluctant manufacturer by conspiratorial distributor pressure—which in the case of General Motors seems rather unlikely—these proposi-

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[21] *United States v. General Motors Corp.*, 384 U.S. at 144-45, 146, 147, 148 n.23 (1966).

tions cannot co-exist with the basic principles established by *GTE Sylvania.* It should make no difference to the applicability of a rule of reason to non-price restrictions that: (1) a problem has been called to the attention of the manufacturer by a concerted presentation of distributor complaints; (2) joint collaborative action has excluded discounters from access to the market; (3) a substantial restraint on price competition is inherent in the action taken by the manufacturer; or (4) the manufacturer is concerned that its distributors have an adequate profit opportunity. Nor should it make any difference that the manufacturer has solicited and obtained the assistance of its distributors in helping to police its restrictions. If the restrictions are a legitimate pro-competitive device, there is no reason why the manufacturer should be compelled to set up its own monitoring system when the use of its distributors, who are on the scene, will generate the information more quickly and cheaply.[22]

C. Reasonable Non-Price Distributional Restraints Are Not Rendered Illegal *Per Se* by the Presence of Unlawful Resale Price Maintenance Agreements.

Finally, it is worth pointing out that even in a case where it is proved that the manufacturer was a party to unlawful resale price maintenance agreements, it makes no sense, after *GTE Sylvania,* to hold that otherwise lawful non-price restrictions are thereby rendered illegal *per se.* The fact, if it is a fact, that a manufacturer has superimposed unlawful resale price agreements on non-price restrictions that are themselves pro-competitive does not mean that the latter have lost their beneficial character. Accordingly, a distributor who is terminated for failure

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[22] As the foregoing discussion should indicate, we are not proposing that the Court abandon the distinction between vertical and horizontal restraints expressed in *GTE Sylvania.* We do not suggest immunity for distributor cartels that coerce manufacturers into adopting distributional restraints—price or non-price—that in the latter's judgment would disserve their and the consumers' interest in efficient and competitively-priced product-service offerings.

to fulfill service obligations, or for selling outside his assigned territory at discounted prices, cannot recover simply by proving that the manufacturer also required distributors to adhere to specified minimum resale prices. Instead, the jury should be instructed in such cases that it must evaluate the restrictions under the rule of reason. This Court's decisions do not require any different result.[23]

CONCLUSION

This Court should reverse the judgment of the court below and clarify the relationship between *GTE Sylvania*'s rule of reason treatment of vertical non-price restrictions and the traditional rule of *per se* illegality for resale price maintenance agreements.

Respectfully submitted,

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May 13, 1983

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[23] *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), relied on by the court below, is readily distinguishable as the territorial restraints were expressly stated to be horizontal, not vertical. In fact it was unnecessary for the Court, once having found the restraints to be horizontal, to have struck them down on the ground they were related to price-fixing, because horizontal territorial agreements are unlawful in and of themselves.

No. 82-914

In the

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

BRIEF OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Is Monsanto's marketing program to be deemed per se unlawful if part of a retail price-fixing scheme?

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BRIEF OF THE
NATIONAL ASSOCIATION OF CATALOG
SHOWROOM MERCHANDISERS AS AMICUS
CURIAE IN SUPPORT OF RESPONDENT

This brief is filed on behalf of the National Association of Catalog Showroom Merchandisers (NACSM) in opposition to Petitioner. Consent has

been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL ASSOCIATION OF CATALOG SHOWROOM MERCHANDISERS

NACSM represents approximately 2,000 discount retailers who provide the same essential services as their retail competitors. NACSM members are increasingly injured by the retail price fixing of manufacturers, in a manner often termed "resale price maintenance."

NACSM was organized in 1972 to address the problem of longer established high margin retailers who objected to lower priced retail competition in the marketplace. NACSM testified before the United States Senate in 1975 in favor of repeal of resale price maintenance ("fair trade"), and has a continuing interest

in manufacturers' attempts to restrict products after they enter the free flow of interstate commerce.

NACSM believes this case raises important nationwide issues relating to retail price fixing by manufacturers of mass-merchandised products heretofore violative of Section 1 of the Sherman Act.[1].

NACSM's concern is that Petitioner, Monsanto Company ("Monsanto"), and the United States, through the Department of Justice, are inappropriately using this case as a means to change the law thereby encouraging manufacturers to coerce adherence to retail prices, which proposition, if adopted, would be detrimental to the free marketplace and to consumers.

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1. 15 U.S.C.1

SUMMARY OF ARGUMENT

Competition is most workable on the retail level, and interbrand competition is generally not fostered by curtailing intrabrand competition. The burden of proof has not been met to reverse seventy years of legislative and judicial precedent on the subject of price fixing.

Spray-Rite offered more than sufficient evidence for the jury to find that defendant and one or more of its distributors agreed, conspired and/or combined to stabilize retail prices, and to deny plaintiff access to products as a part of a price fixing scheme.

Moreover, the intervention of the Department of Justice has raised a nationwide alarm to the critical issue of whether the court should abandon

a <u>per</u> <u>se</u> test in determining whether manufacturers' price fixing conspiracies violate Section 1 of the Sherman Act, and thus retard or eliminate the development of efficient and effective low overhead retail distribution systems.

The arguments offered to support manufacturers' control of prices throughout the economic channels of distribution are in error, and do not meet the burden of the preponderance of the credible evidence. This is not a case of "elusive evidentiary standards", but rather a daring, unsubstantiated attempt to assert a "new marketplace reality of a joint venture distribution network" controlled by manufacturers and excluding non-cooperative, that is discount,retailers.

Monsanto went well beyond any unilateral refusal to deal by coercing and combining to eliminate retail price cutting, and retail price cutters. Its actions should be subjected to the per se rule of construction.

In its most elemental sense, the manufacturer attitude is "it was my product and I can fix prices on it if I choose."

It is our belief that this is not the law, never was the law, and we would respectfully suggest that in the full light of public debate, never will be the law.

Some suggest an exception to their generally perceived benefit of retail price fixing if there is collusion on the same competitive level. However, if we are going to focus on economic effect and permit price fixing when it

is imposed by the supplier, we fail to see the need to differentiate between retailers or distributors who "meet in a back room" to effectuate the same purpose, at least if the agreement only encompasses a limited product line. The present rule to the contrary should be upheld and once a combination can be reasonably inferred from all of the credible evidence by the trier of fact, a violation of Section 1 must be recognized.

If this were not the law, unlawful conduct would be limited to those cases where numerous different brand manufacturers adopt a similar market practice of resale price maintenance with concomitant price stabilization that could clearly be traced to higher prices for competing brands, that is until almost everyone begins to

charge a higher price for their brand name products. As we understand it, at this point even the Justice Department would withdraw its support for resale price maintenance and would object to the continuation of these oligopolistic practices.

We ask the Court to take judicial notice that there are numerous consumer product lines presently dominated by a handful of manufacturers, and that the ultimate result of encouraging retail price fixing is predictable.

As more fully discussed below, it is not "new entrants" but dominant manufacturers such as Monsanto and makers of many mass-merchandised consumer products who have created a consumer demand and who are able to, and do, attempt to maintain non-competitive retail prices. Recent

petitions to the Federal Trade Commission requesting relief from court approved orders banning vertical restrictions suggest that as a general rule, it is long entrenched suppliers who object to lower priced retailers because they can make more money by fixing prices. Thus, the expression "free rider" most aptly applies to those who wish to be protected from competition whether on the supplier or the retailer level.

The case of Continental T.V., Inc. v. G.T.E. Sylvania, 2 recognized the distinction restating that price restraints are unlawful *per se*. We respectfully suggest that this is a sound position and if there is to be such a sweeping change in the law, the case need be made to the Congress of

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2. 433 U.S. 36 (1977).

the United States after opportunity for full public debate.

ARGUMENT

I. THE REASONS FOR A PER SE RULE ARE IMBEDDED IN LEGISLATIVE INTENT

We look with wonder at the Department of Justice complaint of low prices.

It is said that if competitors on the same "horizonal" level agree to fix prices, it is "collusive" and unlawful *per se*. However, if the price fixing is in a "vertical" (supplier/purchaser) relationship, we are told to look at the "motivation". If it is not dealer-coerced, it is said not to be an evil. In this upside down world, vertical price fixing is praised if the participating buyers and sellers perceive it is to their economic advantage.

Congressional intent is boldly replaced with Departmental policy rather than meeting the extraordinary burden of showing that a century of judicial precedent and marketplace experience is wrong by offering empirical data and statistical evidence. We respectfully suggest that the case at bar does not provide an adequate basis to meet that burden.

The issue was fully considered by the United States Congress, which overwhelmingly reaffirmed the generally accepted recognition that price fixing by manufacturers is wrong, when it repealed the fair trade laws. 3.

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3. The Consumer Goods Pricing Act of 1975, Pub. L., No. 94-145 89 Stat. 801, amending 15 U.S.C. Section 1, 45(a).

This Court recognized the intent of the Congress in the G.T.E. Sylvania case when it noted that:

> "As in Schwinn, we are concerned here only with nonprice vertical restrictions. The *per se* illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As Mr. Justice White notes, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in White Motor Co. v. United States, Mr. Justice Brennan noted that, unlike nonprice restrictions, "resale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product and competing brands." Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing." . . . Furthermore,

> Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975. No similar expression of congressional intent exists for nonprice restrictions. 4. (All Citations omitted).

There has been no change in the law. No evidence has been provided to support this request to abrogate the antitrust laws and the proposition that price fixing is a social and economic good.

Congressional concern was recently reflected in U.S. House of Representatives Judiciary Authorization Bill, Section 14, unanimously reported to the floor by the full Committee, which directed that no funds authorized

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4. G.T.E.Sylvania at 52, n.18

thereunder shall be used to "overturn or alter the per se prohibition of resale price maintenance in effect under the federal antitrust laws." 5.

The United States Senate, in a Joint Resolution sponsored by at least 48 Senators, has called on the Department of Justice and all other federal agencies to enforce the federal antitrust laws including the _per se_ ban on resale price maintenance. 6.

In addition, we are apprised that a group of United States Senators and Congressmen feel compelled to file an Amicus brief in this case on behalf of respondent Spray-Rite.

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5. H.R. Res. No. 2912, 98th Cong. 1st Sess. (1983)

6. S.Joint Res. 105, 98th Cong. 1st Sess. (1983)

While we recognize the unusual nature of the above reference in a case between two private parties, we are compelled to address an issue that we perceive as a threat to the entire discount retail industry, without the benefit of full public debate.

II. PRIOR PRECEDENT IS NOT OVERRULED BY ASSERTING THAT MONSANTO WAS NOT SUBJECT TO ANTITRUST SCRUTINY UNDER THE PER SE RULE.

Petitioner and the Department of Justice, recognizing the extent of evidence of the horizontal nature of the combination submitted to the jury in the case at bar, wrestle to ignore it, turning instead to the adequacy of the multitude of evidence considered.

Petitioner argues that there was insufficient evidence of horizontal aspect to satisfy a finding of a

combination to stabilize prices and cut off price fixers.

The law as enunciated in Klors v. Broadway Hale Stores, Inc. 7. clearly recognized that a group boycott among a group of manufacturers and retailers can be a *per se* violation of the Sherman Act.

In United States v. General Motors Corp., 8. the Supreme Court characterized a case where dealers and a manufacturer prevented other dealers from selling to discounters as "a classic conspiracy" which deprived dealers of their right to sell through discounters if they chose, stating that there was no need to even inquire into economic motivation. The case at bar

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7. 359 U.S. 207 (1959)

8. 384 U.S. 127 (1966)

is not one of mere imposition of dealer location restrictions which the Court permitted to be judged under a rule of reason standard as in <u>GTE Sylvania</u>, supra. Petitioner attempts to differentiate its "dead hand" tactics by asserting that the conspiracy is conceived at the top, not by the dealers, and that such initiation of the scheme removes its anticompetitive nature and effect.

When, as in the case at bar, the trier of fact is presented with evidence to reasonably conclude that a combination existed, it is of little assistance to petitioner to point out that prior cases also found such a combination.

A similar system to maintain resale prices was struck down by the Supreme

Court in <u>Simpson v. Union Oil Co</u>. 9. Union Oil developed a plan under which its independent dealers fixed the prices at which the gasoline was to be sold. The Court held that when a device is "used to cover a vast distribution system, fixing prices through many retail outlets," the antitrust laws prohibit such a practice.

Enforcement of price maintenance has long been recognized as a violation of law. In <u>Federal Trade Commission v. Beechnut Packing Co</u>., 10. the defendant used code numbers on its products and instituted a system of reporting; an offender was cut off and reinstated upon assuring that he would maintain prices in the future. The Supreme Court recognized that this

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9. 377 U.S. 13 (1964)

10. 257 U.S. 441 (1922)

hindered and obstructed the free and natural flow of commerce in the channels of interstate trade.

This rule has been consistently applied as the law of the land by our courts. For example, in United States v. Parke, Davis and Co. 11. the company put into effect a program to promote observance of minimum retail prices by retailers involved. The U.S. Supreme Court stated that:

> ... In thus involving the wholesalers to stop the flow of Parke Davis products to the retailers, thereby inducing retailers' adherence to its suggested retail prices, Parke Davis created a combination with the retailers and the wholesalers to maintain retail prices and violated the Sherman Act..." Id. at 45.

The entire policy was tainted with the "vice of...illegality," cf. United

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11. 362 U.S. 29 (1960)

States v. Bausch & Lomb Optical Co., 12. when Parke Davis used it as the vehicle to gain participation in the program to effectuate the retailers adherance to the suggested retail prices.

The Department of Justice argues that the Court of Appeals erred in ruling that the jury could find a new marketing program of "territorial assignments" to be a per se violation of Section 1 merely because it was alleged to have an effect on price, and thus to be part of a resale price maintenance scheme by permitting the line between non-price and price arrangements to be "blurred" in this way. It argues that the Court of Appeals' ruling undermines the approach

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12. 321 U.S. 707 (1944)

adopted by this Court in Sylvania, supra, and exposes the difficulties inherent in analyzing "non-price" vertical restrictions under the rule of reason, while treating vertical price restrictions -- resale price maintenance -- as unlawful *per se*.

The Department concedes that resale price maintenance can cause adverse competitive effects at which the antitrust laws properly are aimed. But it next asserts, without adequate support, that the existence of the conditions under which such adverse effects might occur usually are ascertainable through examination of a limited set of objective factors, and, when such effects are demonstrated, the practice will be unlawful under the rule of reason. The Department's brief next boldly asserts, without evidence or

even economic analysis, that virtually all of the adverse competitive effects of resale price maintenance will occur: (1) where a group of manufacturers attempts to use the practice to police and strengthen a cartel among themselves; and (2) where one or more of a manufacturer's distributors, in order to exercise market power or form or police a cartel, coerce the manufacturer (and perhaps other suppliers) to impose an inefficient resale price maintenance system -- one that reduces quantities sold -- for the benefit of the coercing distributors.

The Department of Justice and the petitioner have utterly failed to show that retail price fixing only occurs in a "cartel" situation, or that even if it did, that there is a preponderance

of pro-competitive effects that generally arise. Indeed, almost all experience of the courts, of public debate before the Congress, and in the marketplace are to the contrary.

The Court has not been given sufficient reason to abandon its per se prohibition against price fixing. The last time the issue received the full airing of public debate was at hearings prior to repeal of the "fair trade" laws.

At these hearings Senator Edward Brooke, among others, cited compelling reasons for removing this "federal umbrella for legalized price fixing". 13. President Ford, in January, 1975, supported repeal and

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13. Hearings on S. 408 Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess. at 1,3 (1975)

assailed the fair trade laws for allowing manufacturers "to dictate retail prices". 14. The Chairman of the Federal Trade Commission stated "I have tried to think of any argument in favor of maintenance of the fair trade laws. I could not think of any". 15. The Assistant Attorney General in charge of the Antitrust Division agreed. 16. The "fair trade" law was repealed by Congress at that time whereupon it was determined that henceforth these practices were unlawful.

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14. Id. at 285

15. Id. at 9, 16

16. Id. at 16

III. THE BURDEN UPON THE COURTS AND LITIGANTS PROVIDES A SOUND BASIS FOR CONTINUATION OF THE CLEAR LEGAL STANDARD.

There will be a major increase in antitrust cases if manufacturer price fixing is encouraged, with each case requiring detailed economic scrutiny and analysis, thereby placing a major additional burden on our already overcrowded courts. 17.

Despite the explanation by proponents of retail price fixing that it will permit more manufacturer flexibility, its opponents point out

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17. There has been a 14.2% increase in total federal cases commenced in the last five years. While antitrust cases declined from 1477 in 1978 to 1,066 in 1982, these "big" cases require major discovery and protracted trials placing a disportionate load on the federal judicial system. See Administrative Office of U.S. Courts, Table of District Court Cases 1978-1982 (1982).

that it will promote price rigidity and tangled economic "self regulation" and relationships which are not readily measured by merely determining if there may have been a manufacturer cartel.

The Department of Justice suggests that it merely seeks to have a rule of reason analysis applied to each particular case. However, concomitantly the certainty in this area of the law will be removed. It will be more difficult and costly for plaintiffs to bring retail price fixing cases.

Simultaneously, the Department now seeks to have the Congress amend the antitrust laws to eliminate treble damages in other than *per se* cases. 18.

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18. There are similar attempts by the Department to limit antitrust plaintiffs to single damages in all

Under a judicial rule of reason with single damages, other than for those few plaintiffs fortunate enough to prevail, there will be a reality that price fixing by manufacturers will be "good" until someone proves them "bad" (and in fact prove that a cartel existed if the Department of Justice evidentiary standard is adopted).

It is difficult for the catalog showroom industry to understand why anyone would wish to accomplish this, and prevent them from selling consumer goods at competitive retail prices

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Footnote from page 26 continued.

intellectual property cases by amendment to 35 U.S.C. 271, and 17. U.S.C. 501 (such as the patented Monsanto herbicides which are the products at issue in the case at bar). See, 44 Antitrust & Trade Regulation Reporter 713 (March 31, 1983)

especially since, as discussed herein, there is generally no basis for the purported "free rider" problem.

It is difficult to understand why the issue is raised in the case at bar, which is not an appropriate case for the discussion. It is respectfully suggested that the court need not abandon the _per se_ rule to determine adequate basis for finding a clear violation of the antitrust laws in the case, under any standard.

The Court is requested to take judicial notice of the fact that many mass-merchandised consumer products are produced primarily by foreign manufacturers, and often sold through U.S. marketing subsidiaries. The ability to increase profit margins by setting United States retail prices has not been demonstrated to be of such

social or economic welfare to the United States of America to justify the attendant costs of such manufacturer control. Furthermore, there are present attempts to expand manufacturer control by preventing actual and potential price competition from the importation of competing products. The end result would be to make the United States an island of high prices in an otherwise worldwide sea of competitive prices. 19.

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19. See Bell & Howell:Mamiya Co. v Masel Supply Co., 548 F. Supp. 1063 (E.D.N.Y. 1982), app. pending before the U.S. Court of Appeals for the Second Circuit,Civ 82-7857, amicus brief in support of defendants filed by the U.S. Department of Justice and argued March 28, 1983.

IV. THE FREE RIDER ARGUMENT IS ILLUSORY

The Department of Justice suggests that this case threatens to stifle many types of procompetitive non-price restraints taken by manufacturers to improve their products'competitive position because it allows the jury to consider if the evidence supports a retail price fixing scheme which is then judged under a *per se* standard.

To encourage general retail price fixing by manufacturers on the hope that it may somehow encourage interbrand competition is to ignore the benefit of competition on the retail level, where it is most workable because of the large number of competitors.

It is argued by proponents of resale price maintenance that if the only effect of retail price fixing is

to elevate prices, the marketing program will fail, or that it is inconsistent with the profit seeking objective of the manufacturer to allow its distributors to earn above-competitive profits. There is no support offered for these assertions; none exists. It is not necessary for a manufacturer cartel to exist for the participating supplier and retailers to mutually benefit from above-competitive prices so long as there is sufficient brand identification for the public to pay a price above what retail price competition would otherwise create.

Indeed, a primary motive for manufacturers such as Monsanto to adopt resale price maintenance schemes is to encourage distributors and retailers to promote their products over that of competitors because of the higher profit margin the selling retailer will

otherwise earn. The purpose is to assure that all cooperators will earn an artificially higher profit than they will earn on competing brands, where retail price competition does exist. This is the essence of almost all price fixing schemes.

There is a serious question as to whether interbrand competition even existed in the case at bar, with the record replete with testimony about a unique, patented herbicide. However, even assuming, arguendo, that interbrand competition existed, there is a further serious question as to whether a sufficient case has been made to eliminate the per se proscription of agreements, or coercion to enforce retail price fixing. This suggestion that interbrand competition is, in most instances, assumed to be increased if

intrabrand competition is eliminated is also a dubious proposition without evidentiary support. In order to point to the success of such programs, proponents point to more profits reaped from the higher prices they have been able to charge. A similar analysis would apply to all price fixers.

As did Spray-Rite in the case at bar, catalog showrooms and many other discount retailers provide the same services as their higher-margin competitors. Moreover, the factual pretext of "free rider" 20. is unsupported by the evidence, and unfounded.

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20. The "free rider" effect is also set forth in the case of Davis Watkins Co. v. Service Merchandise Co., 686 F.2d 1190, 1195, n. 8 (6th Cir. 1982), petition for cert. filed, 51 U.S.L.W., 3421 (U.S. November 19, 1982) (No. 82-848)

However, assuming for purposes of argument, that there are such ancillary services to be provided to the consumer, we suggest that it is the consumer to whom the choice should be left to determine whether or not the services are worth the extra price. Our entire economic system is predicated on this mechanism to allocate resources; manufacturer control for alleged "efficiencies" is conversely a concept alien to our antitrust laws.

Professor H. Michael Mann 21., in

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21. H. Michael Mann, Chairman of the Department of Economics, Boston College, is former Director of the Federal Trade Commission, Bureau of Economics. The references to his arguments are taken from a paper presented to United States House of Representatives Judiciary Committee on March 9, 1983 entitled "Resale Price Maintenance, Antitrust and Per Se Illegality:Reason for a Change?" All footnotes herein are taken from Prof. Mann's original paper.

a recent paper addressed to the House Judiciary Committee, dissects the economic arguments proposed to support a solution to a purported "free rider problem" concluding that this concept does not support resale price maintenance.

Proponents argue that resale price maintenance is a means of providing an incentive to retailers to offer certain services viewed as necessary to market the product. It is said that the incentive to provide the services will be blunted if some retailers avoid ~~such~~ responsibility and instead charge lower prices, reflecting their lower costs from the lack of provision of the services and that sales of the product suffer.

Resale price maintenance is not an appropriate means of avoiding this "problem" because it removes price as a competitive weapon and forces retailers to compete by non-price methods by offering the services said to be necessary to enhance product sales. Resale price maintenance is claimed to be a reasonable policy in the context of the free rider problem, and so it is said *per se* illegality for this practice is unjustified.

This proposition is questionable when we consider all the conditions that would have to exist for there to be any serious risk of free riders.

Professor Mann initially notes that the service has to be pre-sale. Any service that is post-sale, (such as credit), is linked to a particular

dealer. No other dealer can free ride on these particular kinds of services.

Secondly, the service has to be product, not dealer, specific. This means that there has to be something about the product that requires a pre-sale service such as demonstration or instruction about its use.

Thirdly, the service cannot be separately priced. If it can, then there is no free ride.

Fourth, the free rider problem is not eliminated if the customer can obtain the service from one dealer and buy the product from another retailer, since the higher price is not related to the service provided.

Lastly, the product need be one for which the retailer is an important source of information about the

product's characteristics, often called a "nonconvenience good." 22. It is important to distinguish the conceptual difference between having a retailer explain and instruct about a product, and having a retailer "push" a particular manufacturer's brand of product. The latter amounts to point-of-sale advertising for a particular manufacturer. The free rider problem cannot exist as the motivation in the latter instance where resale price maintenance necessarily leads to the payment of unnecessarily higher prices. This is so because the above-competitive margin is a reward fashioned by a manufacturer for payment to a retailer for telling consumers

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22. For the taxonomy, See Porter, M. Interbrand Choice, Strategy, and Bilateral Market Power, 23-24 (1976).

that his product is preferrable; it is not related to any real "services".

Professor Mann notes the conditions are extremely restrictive and that of the sixteen products for which retail price maintenance was principally found, six are convenience goods 23., the kind of products for which a free rider case under resale price maintenance simply cannot exist. 24.

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23. Hearings on Fair Trade Laws before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary (Useem, H.), 94th Cong. 1st Sess. at 323 (1975). The designation of convenience goods comes from Porter, M. op. cit. supra, table 6-1, at 139-40

.24. Before repeal of the fair trade laws by the Congress, numerous manufacturers utilizing resale price maintenance sold unsophisticated consumer products where it is particularly difficult to apply the service argument. Recent F.T.C. cases suggest that many proponents of a resurrection of fair trade continue to be

It is important to note here that the imposition of resale price maintenance in order to maintain these outlets may, in fact, inhibit the evolution of efficient distribution methods. 25.

Footnotes from page 39 continued.

companies in industries that obviously require little in the way of unique services such as apparel, Matter of Levi Strauss, F.T.C. Docket No. 9081 (7/12/78); Candy, (Matter of Russell Stover, F.T.C. Docket No. 9140 (7/1/82), and chinaware (Matter of Lenox, F.T.C. Docket No. 8718 (7/12/82). These companies have higher recognizable brand names and are convenience customer goods that do not require the sales assistance that would otherwise lie at the heart of any free rider problem.

25. Porter, op. cit. supra, at 66-67; For an excellent, more general elaboration of this important point (the need to promote retailer efficiency through discount outlets) See Steiner R. Vertical Restraints and Economic Efficiency, Federal Trade Commission Working Paper No. 66, (June, 1982).

The use of retail price maintenance also indicates that the manufacturer's product possesses strong brand image. The reason is that the image retards retailers from effectively selling competing brands not subject to retail price maintenance since consumers expect the retailer to carry the product. 26.

Of course, this brand identification is what the manufacturer longs to use to induce sales above otherwise competitive retail prices. The additional support given by the retailer to promote brand

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26. This reasoning has been called a "mutual dependence theory." The manufacturer and the retailer need each other and their interaction strengthens product differentiation. Bowman, W. Jr., Resale Price Maintenance--A Monopoly Problem, J. Bus. (Univ. Chic.) (July 1952); See also Porter, op. cit. supra at 65.

identification that is already strong actually weakens interbrand competition. If the manufacturer is to be subject to any pressure on price, it has to come from intra-brand price competition, to wit; competition among retailers. Resale price maintenance permits the manufacturer's product differentiation advantage to escape any pressure on the wholesale price that might come from vigorous retail price competition. 27.

Since significant product differentiation appears to be a major force in explaining rising concentration levels in consumer goods

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27. Peter Gerhart, The 'Competitive Advantages' Explanation for Interbrand Restraints: An Antitrust Analysis, 3 Duke Law Journal, 417, 431 (1981).

industries over the last 30 years and is a major barrier to new entry 28., it clearly does not seem sensible to tolerate a practice conducive to promoting structural conditions that are monopolistic. This is particularly so when the costs of retail price fixing to the consumer in prices paid

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28. Muller W. and Rogers R. The Role of Advertising in Changing Concentration of Manufacturing Industries, Rev. Econ & Stat. (Feb. 1980); Joe Bain's finding, in his classic study, Barrier to New Competition (1956), that product differentiation advantages constitute the most important entry barrier has, to the best of our knowledge, not been refuted.

have been so well documented. 29.

Professor Mann concludes that the case for retail price maintenance is frail. The conditions under which it might conceivably benefit consumers by being a perceived solution to the free rider problem are so restrictive that it is difficult to imagine a circumstance where retail price maintenance would be helpful, particularly in the absence of any evidence of the kind of consumer behavior presumed by the free rider argument. Moreover, there are more plausible reasons for the desire to use retail price maintenance, all of which blunt, not enhance, the forces of

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29. Hearings on Fair Trade Laws before Senate Subcommittee, supra, at 323, 327.

competition. To engage the judicial process in the exercise of discovering whether a retail price maintenance situation might be defensible carries no more weight than the same kind of argumentation that certain circumstances might justify horizontal price-fixing. 30. It only raises the costs of investigation and litigation inordinately relative to the small probability of finding some benefit.

Professor Mann's analysis applies to the case at bar, where an efficient distributor providing better service at lower prices was driven from the market place by a group of other retailers

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30. Scherer, F.M., Industrial Market Structure and Economic Performance, 509, 513 (1980).

acting in concert with a manufacturer to achieve maximum advantage of a widely acceptable product by eliminating retail price competition.

One of the best, succinct, analyses rejecting the free rider argument states

> "...in an age when advertising has effectively pre-sold so many brand names is the retailer really providing any extra useful service to the consumer in exchange for that higher margin? It's nice to know that he carries a broad selection, but without fair trade wouldn't an enterprising merchant carry as broad a line...as his customers demanded?
>
> Whatever feeble justification may once have existed for fair trade, there is no reason today to place such heavy burdens on the consumer public". 31.

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31. Cong. Rec. 1268 (1/23/75):Art. by Ronald Reagan as introd. by Rep. Syms.

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CONCLUSION

To expand manufacturer control over independent distributors, and those to whom they sell, by allowing combinations to fix retail prices and to deny access to product to "price cutters" is to reverse a century of judicial precedent.

Neither petitioner nor amici in its behalf have justified such a departure from the existing antitrust laws. It is not justified by the record in this case and is contrary to the legislative intent. It is such a sweeping revision of the antitrust laws as to properly be a subject for the Congress of the United States to debate and determine.

The Judgment of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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July 7, 1983

No. 82-914

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

MONSANTO COMPANY,
Petitioner,
v.

SPRAY-RITE SERVICE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Should non-price vertical restrictions, normally tested under the rule of reason, be subjected to a per se rule merely because they are *alleged* to be part of a vertical price-fixing conspiracy?

2. Can a per se unlawful vertical price-fixing conspiracy be inferred solely from evidence that a manufacturer, concerned about resale prices, received price complaints from a distributor's competitors and later did not renew the distributor's contract?

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

This brief is filed on behalf of the National Association of Manufacturers in support of Petitioner. Consent from counsel for both parties has been filed with the Clerk of this Court.

INTEREST OF THE NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers ("NAM") is incorporated under the laws of the State of New York

as a non-profit voluntary business association representing approximately 13,000 manufacturing and related business concerns which, in the aggregate, account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. Many of these manufacturers use distributors to market their products. In addition, through its Associations Department and the National Industrial Council, NAM is affiliated with approximately 158,000 businesses, the vast majority of which are subject to the jurisdiction of the federal antitrust laws. As active participants in the free-market system of the United States, NAM's members have a vital interest that these laws be interpreted according to consistent and predictable standards and in ways which enhance business efficiency and consumer welfare.

STATEMENT

Petitioner Monsanto Company ("Monsanto") is a manufacturer of agricultural herbicides. Its herbicides are sprayed on agricultural land early in the growing season to prevent the growth of weeds, which reduce crop yields. If improperly applied, such herbicides can kill the crop along with the weeds.

Throughout the period at issue in this case, Monsanto distributed its agricultural herbicides through approximately 100 non-exclusive distributors which sold the products to retailers. Each distributor had a non-exclusive "primary responsibility" territory. Approximately 10-20 Monsanto distributors were assigned to each territory. Respondent Spray-Rite Service Corporation ("Spray-Rite") was one such distributor, competing with others in Illinois.

Monsanto suggested retail prices to its distributors, but its price recommendations were generally not followed by them, including Spray-Rite. "Price cutting was

a way of life with distributors" of these products, according to one of Respondent's witnesses. (Tr. 2234). Consequently, there was no evidence of price uniformity in the distribution of Monsanto herbicides.

In the late 1960's, Monsanto's market position in herbicides was marginal. For example, in 1968 it accounted for approximately 3% of the sale of herbicides used on *soybeans*, in competition with two manufacturers who each had over 30% of the market. (DX 501, JA 113, Tr. 3300). Monsanto accounted for 15% of sales of herbicides used on *corn*, but Geigy "dominated the market" with approximately 70% of sales. (Tr. 2881, 3303-04; DX 502, JA 114, Tr. 3300).

Dissatisfied with its market position, Monsanto in 1967-68 instituted a new marketing program stressing distributor service to agricultural retailers. The purpose of the program was to educate retail dealers and farmers on safe and efficient use of Monsanto herbicides, and to promote their use instead of competitors' herbicides. In accordance with this program, Monsanto sent out a letter to Respondent and other distributors "describ[ing] Monsanto's newly adopted criteria for evaluating distributor performance: (1) whether the distributor's primary activity was soliciting sales to herbicide dealers; (2) whether the distributor employed trained personnel capable of carrying out Monsanto's technical programs with dealers and farmers; and (3) whether the distributor was fully exploiting the herbicide market in its area of primary responsibility." *Spray-Rite Service Corporation v. Monsanto Company*, 684 F.2d 1226, 1232 (7th Cir. 1982), App. A-3 (footnote omitted). Meanwhile, Monsanto's new compensation programs included cash bonus payments to distributors for participating in Monsanto's technical schools and demonstrations. *Id.*

Monsanto's new competitive strategy apparently worked. Its share of corn herbicide sales increased from approximately 15% in 1968 to 28% in 1972—a gain largely achieved at the expense of Geigy, whose share fell from approximately 70% to 55% during the same period. (Tr. 3305; DX 502, JA 114, Tr. 3300). Monsanto's share of soybean herbicide sales increased from 3% to 19% between 1968 and 1972. (Tr. 3302; DX 501, JA 113, Tr. 3300). During this period total industry sales expanded substantially and Monsanto's suggested price declined; Respondent's expert characterized the herbicide industry as "highly competitive." (Tr. 2990).

Monsanto did not renew Spray-Rite's distribution contract in 1968. Spray-Rite, despite the fact that it was Monsanto's tenth largest distributor in the country by volume, was basically a one-man organization. Monsanto officials testified that they refused to renew Spray-Rite because it declined to hire an adequate sales and education staff to promote sales to local agricultural dealers, as contemplated by the 1967 program. (Tr. 2510-15, 3825-26). In any event, Spray-Rite's activities were overwhelmingly on behalf of Geigy, whose corn herbicide products accounted for approximately 80% of Spray-Rite's total herbicide sales by volume. (Tr. 936-42, 1074).

Some distributors had at various times complained to Monsanto about price cutting by other distributors, including Spray-Rite; and there is evidence of Monsanto's continuing concern that distributor margins be adequate to support promotional and educational programs. (Tr. 1572-74, 1640-43, 1653-58, 1679-81). However, the most recent complaint to Monsanto by any distributor about Spray-Rite's pricing was *15 months prior* to the nonrenewal. (Tr. 1390-401; PX 185, Tr. 1392, 1394-95).

On these facts, "[t]he district court instructed the jury that it should find Monsanto's conduct per se unlawful

if it found that Monsanto engaged in the alleged conduct in furtherance of a conspiracy to fix resale prices." 684 F.2d at 1233, App. A-4. The jury so found. The court of appeals affirmed.[1]

SUMMARY OF ARGUMENT

The central issue in this case involves the freedom of a manufacturer to terminate a distributor for legitimate business reasons, even though the termination chronologically follows a price-related distributor complaint. Elusive standards on this issue have made counselling and business planning uncertain, and litigation much more frequent. Moreover, inefficiencies in the allocation of economic resources have been the inevitable result.

In the opinion below, the Seventh Circuit ignored the fundamental reality of distributor relationships, recognized by this Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). In truth, a manufacturer and its distributors are essentially joint venturers in marketing the manufacturer's product. Success of their common enterprise necessarily requires communication about the joint marketing program, which may include discussion of non-performance by a competing distributor to the detriment of the overall program. Such continuing communication is entirely consistent with the legitimate marketing goals of the manufacturer and is not properly the subject of a rule of per se illegality. A terminated "free rider" should not be entitled to get to a jury simply because a price-related complaint preceded termination. Rather, the proper inquiry for the judge concerns the state of interbrand competition, the manufacturer's sales and service program, and the legitimacy of the manufacturer's concern about non-performance by the distributor.

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[1] Monsanto was also found to have engaged in a post-termination boycott of Spray-Rite. 684 F.2d at 1235-36, App. A-9 - A-11. Monsanto has not sought certiorari on this issue and we express no view on it.

ARGUMENT

I. MANUFACTURERS REQUIRE A CLEAR AND CONSISTENTLY APPLIED LEGAL RULE TO DEAL WITH THE RECURRING SITUATION TYPIFIED BY THIS CASE.

Effective distribution is often crucial to a manufacturer's success in competitive product markets. Particularly if a product is complex, potentially harmful, new, or generally unknown, the manufacturer has obvious reasons to encourage his distributors and dealers to explain and promote its product vis-a-vis those of its competitors. An effective effort requires continuous communication between the manufacturer and its individual distributors and dealers.

Where a particular distributor fails to carry out the education-promotion activities contemplated by the manufacturer, his non-performance can bring about "the so-called 'free rider' effect" discussed by this Court in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55 (1977). The distributors who provide the service are placed at a cost disadvantage vis-a-vis the distributor who does not, and the non-complying distributor can reduce prices accordingly.[2] As a result, promotional and educa-

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[2] The Sixth Circuit very clearly explained the issue in Davis-Watkins Co. v. Service Merchandise, 686 F.2d 1190, 1195 n.8 (6th Cir. 1982):

> The "free rider" problem arises where pre-sale, point-of-sale or post-sale services are offered by the manufacturer's authorized distributors and dealers. Discounters are tempted by market forces to obtain and retail the same product without offering such services. Because the discounter does not incur the cost of providing services, it is able to offer the "raw" product at lower prices. Further, consumers are able to obtain and take advantage of the services provided by the authorized distributors and dealers while ultimately purchasing from the discounter. Finally, the authorized distributors and dealers are thereby required to offer services by the manufacturer without obtaining the benefit of retail sales.

tional "services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did." *Id.* This problem, which can apply equally at the distributor level, is particularly acute where (as in Monsanto's case) distributors are not given exclusive territories.

This "free rider" problem is obviously of great concern both to a manufacturer *and* its distributors. Not surprisingly, it is frequently an aspect of the ongoing discussions between them. When a distributor cuts prices sharply, a competing distributor is likely to complain to the manufacturer. A manufacturer has no control over such complaints, although the manufacturer who assumes greater responsibility for distributor planning is more likely to receive such complaints in the normal course of business.

Since substantial price cutting is likely to be indicative of failure to provide sales and educational services, such a distributor complaint is likely to trigger an analysis by the manufacturer. Sometimes a manufacturer will find that the price-cutting distributor is simply not doing what he contracted to do. If so, the manufacturer has a legitimate interest in terminating such a distributor. Yet exercise of that legitimate interest may be risky. *Battle v. Lubrizol Corp.*, 673 F.2d 984 (8th Cir. 1982)—a case relied upon by the Seventh Circuit in *Monsanto*, 684 F.2d at 1238-39, App. A-15—illustrates the point very clearly. In that case, the defendant manufacturer had appointed the plaintiff as a distributor to develop sales for its rustproofing products in the *marine* field. 673 F.2d at 986. Thereafter, a distributor complained that the plaintiff was cutting prices on sales in the *automotive* sales field. The manufacturer found that the plaintiff had not developed the marine uses at all, and terminated the plaintiff. Yet on this evidence, the Eighth Circuit held that plaintiff was

entitled to get to the jury on its per se theory that the manufacturer was engaged in vertical price-fixing.[3]

The dilemma created in this area is intensely practical. The manufacturer in the *Monsaňto* or *Lubrizol* situation simply does not know what he can do after receiving a price-related complaint. Can he investigate the circumstances? Can he terminate a distributor who is not performing his distribution contract? Or must he continue the non-performing distributor indefinitely, simply because of another distributor's concern about the latter's pricing? Counsel must advise him that there is substantial risk of his being sued in such a complaint-and-termination case; and that treble damage liability may well turn on whether a jury believes that the manufacturer (1) "conspired" with the complaining dealer (or dealers) and (2) sought to "fix" or "stabilize" prices in the resale market. Counsel must also advise that a jury may view a single, solitary "complaint" as a "request" to terminate, and may also infer from evidence solely of the complaining *distributor's* concern about prices an "agreement" by the manufacturer to "fix prices."[4] The busi-

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[3] 673 F.2d at 991-92. This was despite the District Court's finding that the evidence was undisputed that defendant "Lubrizol never discussed with plaintiffs the price at which they should resell" the product, 513 F. Supp. 995, 999 (E.D. Mo. 1981). On the same day, another panel of the Eighth Circuit reached the opposite result on similar facts. Roesch, Inc. v. Star Cooler Corp., 671 F.2d 1168, 1172 (8th Cir. 1982) (directed verdict for the defendant who had recommended prices). Similar, but less direct, conflicts exist within other circuits. *Compare, e.g.,* Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 111 (3d Cir. 1980), *cert. denied,* 451 U.S. 911 (1981), *with* Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 168-70 (3d Cir. 1979). The conflicts between circuits are equally pronounced. *See* Schwimmer v. Sony Corp., 103 S. Ct. 362 (1982) (White, J., dissenting) (*cert. denied*).

[4] Counsel might well point to the Third Circuit's summation of the situation in Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 170 (3d Cir. 1979): "Given the *alleged* anticompetitive and *arguably* horizontal impact of United's decision, and given the

nessman (who may have served as a juror) knows that juror responses to generalized jury inquiries of the type used in *Monsanto* are essentially unpredictable, and hence verdicts are likely to turn on subjective impression. He also knows that even if he persuades the jury to his point of view, he is still going to have to pay counsel substantial fees for defending him. The net result may often be to immunize inefficient distributors from termination.

This complaint-and-termination quandary can be solved only if this Court articulates (1) a clear legal standard to determine when a case is to be submitted to the jury and (2) a more structured jury inquiry when it is. The task is difficult but very important. Only in this way can legal counselling rise above learned speculation, and business planning proceed with some acceptable level of predictability.

II. DEALER COMPLAINTS ABOUT ANOTHER DEALER'S PRICING DO NOT CONVERT A DEALER TERMINATION CASE INTO A PER SE PRICE-FIXING CASE.

The root error in the Seventh Circuit's opinion was its holding that "[p]roof of distributorship termination in response to competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action." 684 F.2d at 1239, App. A-15. This proposition (for which the Seventh Circuit relied on *Battle v. Lubrizol*, 673 F.2d at 984) ob-

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price orientation of the alleged conspiracy, we cannot say that a *per se* violation of the Act *may* not be shown. If Cernuto can prove at trial that United, Lappin and Famous [the alleged conspiring distributor] conspired to protect Famous from price competition by Cernuto, and that United and Lappin terminated Cernuto at Famous' request and in pursuit of a *price related end*, then it can prevail on a price-fixing theory notwithstanding its failure to show any impact on competition involving kitchen cabinet sales in Western Pennsylvania." (Emphasis added).

scures a key question of causation. What do "in response to" and "concerted action" mean? Is every termination decision which follows a price complaint "in response to" and hence "concerted," even if it was "primarily" based on non-performance of distributorship contract obligations? *Cf. Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 109 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Is the test met if the manufacturer would not have learned of the distributor's non-performance of sales obligations but for the price-related complaint? *Cf. Battle v. Lubrizol*, 673 F.2d at 984. As applied by the Seventh Circuit panel here, it apparently means that every such price complaint-and-termination case goes to the jury as a potential per se "conspiracy." This exposes a manufacturer to all the risks of a trial in which the plaintiff could recover treble damages without proof of market effect (or even *with* proof of pro-competitive effects), if there is evidence that "the termination is motivated by a desire to reduce or eliminate the price competition for the manufacturer's products." 684 F.2d at 1234, App. A-6.

Because the standard is unclear, the decisions in the various circuits are conflicting, or at least confusing in their practical application. *Compare Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978), *and Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d at 105, *with Cernuto, Inc. v. United Cabinet Corp.*, 595 F.2d 164, 170 (3d Cir. 1979). We submit that inference of a price-fixing conspiracy cannot responsibly be drawn absent some evidence that price was the principal *cause* of action taken by a manufacturer subsequent to distributor complaints. Otherwise, temporal coincidence alone could be enough to get to the jury. *Cf. Battle v. Lubrizol*, 673 F.2d at 984.

The Seventh Circuit's approach ignores the real marketing relationships between a manufacturer and distributor recognized by this Court in *GTE Sylvania*. A manu-

facturer and its distributors are engaged in what is essentially a joint venture to market the manufacturer's products in competition with those of its competing manufacturers. Communications among the partners, as among horizontal joint venturers, are important to the success of the common enterprise. To say that a particular communication "is sufficient to raise an inference of concerted action," even though it is entirely consistent with the manufacturer's unilateral interest in a legitimate marketing program, is a most distorted use of the conspiracy concept. The Sherman Act proscribes a "conspiracy, *in restraint of trade*" (15 U.S.C. § 1, emphasis added), not conversations among legitimate partners.

Part of the problem is that conspiracy concepts developed in the horizontal competitor context are difficult to apply in the manufacturer-dealer context. Random discussions among direct competitors are often suspect. *See* A. Smith, *The Wealth of Nations, cited in United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980). The question of whether chance contacts among competitors become a "conspiracy" depends on whether the alleged conspirators "had a unity of purpose or a common design and understanding, or a meeting of minds." *American Tobacco Co. v. United States*, 328 U.S. 781, 810 (1946).

In the manufacturer-distributor context, the parties plainly have "a unity of purpose or a common design" to develop an effective merchandising program. This is entirely legitimate. Non-performance of key duties of such a program by any participant is necessarily of concern to others. Pricing is part of the picture, because "free riding" by a non-performing distributor often involves price cutting. *Davis-Watkins Co. v. Service Merchandise*, 686 F.2d 1190, 1195 (6th Cir. 1982). Hence the inquiry cannot be simply whether the parties in the joint distribution undertaking (the manufacturer and its distributors) communicated, were engaged in the common undertaking, and

were concerned about price—but whether the actions taken were consistent with the legitimate goals of the manufacturer in establishing the joint program.[5] Only when communication *and* any resulting action are shown to be inconsistent with such legitimate goals is there evidence "sufficient to raise an inference of concerted action" and hence go to the jury on a per se theory.[6]

It is clearly inappropriate to apply the per se label to such complaint-and-termination evidence, which is often economically ambiguous, without regard to the relationship of the communication and conduct to the manufacturer's legitimate goals. As this Court stressed in *GTE Sylvania*, "[*p*]*er se* rules of illegality are appropriate only when they relate to conduct that is manifestly anticom-

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[5] The Seventh Circuit explained the problem very clearly in Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742, 744 (7th Cir. 1982) (per Posner, J.):

> If a supplier wants his distributors to emphasize non-price . . . competition . . ., he will be hostile to price cutters because they will make it harder for his other distributors to recoup the expenditures that he wants them to make on presale services and other forms of non-price competition, and of course the undersold distributors will be equally or more hostile. The motive of suppliers and distributors alike could thus be described as wanting to eliminate price cutters yet there would be no per se illegality so long as the supplier was not just knuckling under to the distributors' desire for less competition. . . . It is enough [to avoid the inference of conspiracy] that in this case the plaintiff did not prove an improper motive by the supplier.

[6] NAM seeks to deal with this case from the perspective of the practical problem now faced by manufacturers who want to use distribution systems. Accordingly, it assumes the existence of this Court's precedents holding that vertical price-fixing is per se illegal in some circumstances. We do not reach the broad and important point, raised by the Solicitor General in his amicus brief supporting certiorari, whether it is ever appropriate, in light of the policy announced in *GTE Sylvania*, to impose a per se rule in a vertical pricing case.

petitive." 433 U.S. at 49-50, discussing the standard formulation in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958). Even in the horizontal competitor context, the Court has stated recently that the inquiry is "whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979). It is very hard to say that communications between a manufacturer and its distributor about the implementation of a bona fide joint marketing program—or the nonimplementation of the marketing program by the competing distributor—are "manifestly anticompetitive" or "always or almost always tend to restrict competition and decrease output." This is especially so where (as in *Monsanto* and *GTE Sylvania*) the marketing program was instituted by a manufacturer with a small market share and it proved successful in enhancing its competitive position.

In sum, when a per se concept is applied to economically ambiguous evidence, as here, the plaintiff can get a "free ride" to the jury and recover treble damages without any showing that (i) competition was injured, or (ii) the manufacturer's program lacked a legitimate business justification. That produces results directly in conflict with *GTE Sylvania*.

III. THE LEGAL STANDARD SHOULD EMPHASIZE THE MANUFACTURER'S LEGITIMATE INTERESTS IN INTERBRAND COMPETITION AND EFFECTIVE SALES EFFORTS.

Concern about compliance with the service aspects of a manufacturer-distributor arrangement is entirely legitimate and cannot properly be viewed as simply an adjunct to vertical price-fixing. Yet performance of legitimate distribution services and resale price cannot be en-

tirely separated. Rather, as we have suggested, a pattern of heavy discounting is frequently (although not always) symptomatic of a distributor's failure to carry out his sales or service obligations. Therefore, distributor complaints about another distributor's prices are sometimes followed by termination for reasons firmly grounded in the distributor's failure to honor his service obligations. Correlation is not causation.

Accordingly, this Court should specifically mandate structured judicial inquiry to govern the recurring complaint-and-termination case. In the light of *GTE Sylvania* and its underlying policies,[7] the focus should be on the vigor of the interbrand competition and the bona fides of the manufacturer's efforts.

The operative legal standard must separate those cases in which a manufacturer acts out of a legitimate concern over the performance of distributors, and thus promotes competition, from cases where its ends are illegitimate. The standard must provide concrete guidance for the fact-finder, and thus preclude speculation based upon often ambiguous evidence. We therefore respectfully suggest that the likelihood a manufacturer's purpose *could* reasonably have been to fix resale prices should be assessed before the jury is permitted to find a per se conspiracy. To that end, we respectfully suggest that the trial judge ought to consider at least the following questions in determining whether a "conspiracy" claim in a complaint-and-termination case ought to be sent to the jury on a per se basis:

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[7] *GTE Sylvania* teaches that "[i]nterbrand competition is the competition among the manufacturers of the same generic product . . . and is the primary concern of antitrust law," 433 U.S. at 52 n.19, and "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products," 433 U.S. at 54.

1. Was the manufacturer operating in a market where active interbrand competition exists or was there evidence of general lack of uniformity in the resale prices of a manufacturer's product(s)? *See Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982).

2. Had the manufacturer put in place a program to improve its overall success in interbrand competition by imposing education, promotion, or service responsibilities on its distributors? *See Davis-Watkins Co. v. Service Merchandise*, 686 F.2d at 1190.

3. Did the manufacturer have a legitimate concern about the plaintiff's failure to satisfy its performance obligations or about other breach of its distribution contract? *Compare Davis-Watkins Co. v. Service Merchandise*, 686 F.2d at 1190, *with Battle v. Lubrizol*, 673 F.2d at 984.

If the answer to each of the foregoing questions is "yes," we respectfully submit that the manufacturer's termination or non-renewal of the plaintiff does not become a per se price-fixing "conspiracy" simply because one or more competing distributors complained to the manufacturer about the plaintiff's pricing. Accordingly, it should not be submitted to the jury on a per se theory.[8] Moreover, such a case should not be sent to the jury at all unless the plaintiff has offered probative evidence of adverse effect in the relevant market. *See Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*, 637 F.2d 1376, 1388 (9th Cir.), *cert. denied*, 454 U.S. 831 (1981); *Zoslaw v. MCA Distributing Corp.*, 693 F.2d 870, 887 (9th Cir. 1982); *Dunn & Mavis, Inc. v. Nu-Car Driveaway, Inc.*, 691 F.2d 241, 245 (6th Cir. 1982).

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[8] The foregoing is not intended to be an exhaustive test of when the per se test should be rejected. There may be special circumstances in particular cases which suggest that per se treatment is inappropriate. *See, e.g.*, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1 (1979).

Where there is doubt on one or more of the preceding questions, and hence the case may have to be submitted to the jury, specific interrogatories should be addressed to the jury on the nature of the manufacturer's program and the plaintiff's compliance or non-compliance with it. The jury should be instructed to focus upon whether the manufacturer's concern was to control price for its own sake, independent of the dealer's compliance or non-compliance with its sales, service, or other performance obligations. Only in such a case can a per se verdict even arguably be upheld under this Court's prior decisions.

CONCLUSION

If the appropriate legal standard had been used, the *Monsanto* case could not have been submitted to the jury under a per se instruction. Moreover, the jury instructions on "conspiracy" were impermissibly vague. Accordingly, the Court of Appeals decision should be reversed.

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May, 1983

No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,
Petitioner,
v.

SPRAY-RITE SERVICE CORPORATION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF NATIONAL MASS RETAILING INSTITUTE IN SUPPORT OF AFFIRMANCE

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BRIEF AMICUS CURIAE OF NATIONAL MASS RETAILING INSTITUTE IN SUPPORT OF AFFIRMANCE[1]

INTEREST OF AMICUS CURIAE

The National Mass Retailing Institute ("NMRI") is a non-profit organization with a principal purpose of promoting and advancing the interests of its mass retail merchant members. NMRI's 125 members operate over 10,000 retail stores in the continental United States and, together, have a gross annual sales volume well over sixty billion dollars. NMRI member stores are known as "discount retail stores." They operate at low profit margins and sell a high volume of goods at prices well below the manufacturers' suggested list prices.

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[1] This brief is filed with the consent of the parties pursuant to Supreme Court Rule 36.2. The written consents have been filed with the Clerk of the Court.

The discount retail industry has enjoyed explosive growth in the last two decades.[2] NMRI offers a simple explanation for that growth: American consumers have turned to discount stores because those stores offer an attractive blend of low prices and desired services. Because discount retailers and consumers benefit from a retailer's right to offer low prices, NMRI is vitally interested in the preservation of the rule of antitrust law that resale price maintenance is illegal per se. The discount industry owes its success, and its survival, to a retailer's ability to be competitive in the pricing and marketing of brand-name goods.

NMRI submits this brief to urge the Court to continue 70 years of antitrust jurisprudence and to respect the intent of Congress by condemning agreements fixing resale prices as per se violative of our nation's antitrust laws.

SUMMARY OF ARGUMENT

The briefs of petitioner and the United States, as amicus curiae in support of reversal, tug this Court in different directions. Monsanto Company ("Monsanto"), in effect, asks the Court to reverse the court below by rejecting factual findings made by a properly instructed jury and reviewed thoroughly by the court of appeals. The United States, in contrast, asks the Court to reverse the court below by discarding a whole body of settled law. Neither course of action is correct.

While NMRI does not claim to share the parties' familiarity with the record, it would, nonetheless, appear from the instructions to the jury, the jury's answers to special interrogatories, and the court of appeals opinion that a jury could reasonably and properly conclude that Mon-

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[2] A statistical profile of the discount industry is found in *The True Look of the Discount Industry*, 23 The Discount Merchandiser 40 (1983). That publication's statistics show that the dollar volume of sales made by surveyed discount stores increased by 2800% from 1960 to 1982. *Id.* at 42.

santo did in fact enter into an agreement with some of its distributors to maintain resale prices and that, to further that scheme, Monsanto and its distributors agreed to employ certain non-price restraints. Those findings reflect a central policy of antitrust law: a distributor should be free to calculate its own resale price. An agreement that eliminates the distributor's freedom to offer low prices is anticompetitive.

There is a critical flaw in the arguments advanced by petitioner and its supporting amici curiae in denying that a price fixing agreement was ever made. Petitioner and its supporting amici assume that low prices necessarily beget poor service. That hypothesis leads them to conclude that distributor complaints about a competitor's low prices are tantamount to complaints about that competitor's poor service to its customers. NMRI submits that such reasoning is hollow and is no basis for rewriting antitrust law.

As a matter of law, proof that some distributors complained about the pricing of Spray-Rite Service Corporation ("Spray-Rite"), but not about its service, and that, as a result, Monsanto terminated Spray-Rite, without stating any non-price reason, is sufficient evidence to allow the jury to find that Monsanto and its distributors agreed to maintain resale prices. A jury instruction that permits the jury to find an unlawful agreement based on such proof correctly states the law and serves the policy underlying that law. While the jury might have found that Monsanto had a legitimate non-price reason for terminating Spray-Rite, it chose, instead, to believe Spray-Rite's version of the facts. That is the jury's assigned task.

The trial court's instructions to the jury concerning non-price restrictions also correctly state the law. The trial court stated that non-price restrictions are anticompetitive if they are used to effectuate resale price maintenance, but that a mere effect on resale prices does not necessarily make a manufacturer's distribution pro-

gram part of a resale price maintenance scheme. Under those instructions, the jury could have found that Monsanto's non-price restraints were unilaterally adopted for a procompetitive reason; instead, the jury, again performing its assigned task, chose not to accept Monsanto's explanation of the evidence. In short, the instructions to the jury on agreement and on non-price restraints were proper.

NMRI's primary argument, however, is addressed neither to the sufficiency of the evidence nor to the adequacy of the jury instructions. Rather, NMRI urges this Court to preserve settled antitrust law condemning resale price maintenance. There is no basis, factual or theoretical, for abolishing the rule that resale price maintenance is illegal per se.

The per se rule makes sound economic sense: resale price maintenance not only raises consumer prices, thereby diminishing consumer welfare and adding to inflation, but also impedes the development of efficient forms of retailing and facilitates horizontal price fixing at all levels of the distribution chain. Nor is resale price maintenance necessary to accomplish any legitimate goal of a manufacturer, such as the provision of a certain level of services. A manufacturer has many direct means available to it to require the provision of services; fixing a retailer's profit margin does not, either logically or practically, lead to better retail performance. The "free-rider" justification for resale price maintenance advanced by the United States erroneously equates discounting with poor service. NMRI vigorously disputes that equation and submits that low price and good service can, and do, go hand-in-hand.

Congress, too, has explicitly rejected the "free-rider" justification for resale price fixing. In 1975, by enacting the Consumer Goods Pricing Act,[3] Congress declared that

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[3] Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

resale price maintenance is illegal per se. As this Court recognized in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51 n.18 (1976), that Act not only reflects Congress' interpretation of Section 1 of the Sherman Act, 15 U.S.C. § 1, but is positive substantive law in its own right. If any change is to be made in that rule of law, NMRI respectfully submits that it is Congress, and not the judiciary, which should make that change.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY AFFIRMED THE JURY'S FINDING OF FACT AND TRIAL COURT'S INSTRUCTIONS ON THE LAW.

Much of the petitioner's concern in this case is with the jury's competence, and its wisdom, in finding that Monsanto terminated Spray-Rite because Spray-Rite sold herbicides at discount prices.[4] Amici curiae in support of petitioner similarly question the sufficiency of the evidence and the ability of the jury to find the truth.[5]

However, in inviting this Court to question the jury's competence and to review the sufficiency of the evidence, petitioner and supporting amici misperceive the function of the Court. This Court, "[a] court of law . . . rather

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[4] *See, e.g.*, Brief of Petitioner Monsanto Company 18 ("Pet. Br.") : "The evidence does not establish either that Monsanto engaged in a price-fixing conspiracy or that Monsanto's non-price programs were part of such a conspiracy." *See also* Pet. App. D-2 (petitioner's trial counsel's remark that "I just don't think—I don't think the jury is in a case like this capable of understanding these kinds of distinctions.")

[5] *See, e.g.*, Brief of the National Association of Manufacturers 9 ("NAM Br.") (". . . juror responses to generalized jury inquiries of the type used in *Monsanto* are essentially unpredictable, and hence verdicts are likely to turn on subjective impression.") ; Brief of National Agricultural Chemicals Association 11 ("NACA Br.") ("If this is a correct summary of the record, there were no resale price maintenance agreements proved in the instant case . . . .")

than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error." *Graver Tank & Mfg. Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949). NMRI respectfully submits that the court of appeals decision should be affirmed because it accurately states the standard for reviewing the sufficiency of the evidence and properly applies that test (Pet. App. 13-18).

To complement the evidentiary challenge, petitioner and supporting amici also contest the trial court's instructions of law to the jury and the appellate court's review of those instructions. Without endorsing the language of any particular instruction, NMRI wishes to address some of the fallacies in the arguments advanced against the legal standards employed by the courts below. In particular, NMRI vigorously disputes the contention that low-price retailers are necessarily "free riders" who fail to provide services. Efficient retailers can and do offer both low prices and good services.

A. Complaints About a Distributor's Low Prices Do Not Prove That the Distributor Is a "Free Rider": Competitive Prices and Good Service Go Hand-In-Hand.

The record reveals, and petitioner concedes, that Spray-Rite's distributor competitors made complaints to Monsanto about Spray-Rite's *prices* (Pet. Br. 10, 12). No evidence is cited that those competitors complained about Spray-Rite's *services* to its customers or its promotion of Monsanto's product. There apparently is evidence in the record offered to show that Spray-Rite was innovative and provided good service.[6] The absence of complaints about service and the presence of complaints about prices

[6] *See* Brief in Opposition to Petition for Writ of Certiorari of Spray-Rite Service Corporation 4 and record citations provided therein.

allowed the jury to deduce the competitors' probable purpose in complaining to Monsanto: to rid the market of a low-price seller, not to cure the service inadequacies of a "free-rider."

Petitioner and its supporting amici try to justify the distributors' complaints about a competitor's price by fashioning a two-step argument. First, they contend that antitrust law should encourage communications between a supplier and its dealers.[7] NMRI has no quarrel with that general observation and, indeed, agrees with the United States' assertion that ". . . it is the distributors who may have the best perception of how marketing policies fare in practice." (Brief for the United States 5 ("U.S. Br."); *see also id.* at 10-11.)

However, in devising their justification for distributors' price complaints against a competitor and for the manufacturer's subsequent termination of the low-price competitor, petitioner and its supporting amici take an illogical second step, one that fails to appreciate the difference between distributors' complaints about a competitor's *prices* and distributors' complaints about a competitor's *non-price* conduct. Petitioner and supporting amici contend that distributors' complaints about a competitor's price are tantamount to complaints about that competitor's service, because, they claim, a distributor which discounts is likely to provide inadequate service.[8]

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[7] *E.g.*, NACA Br. 3.

[8] *E.g.*, NACA Br. 5 (". . . a distributor who disregards non-price restrictions . . . will often be a price discounter."); *Id.* at 9 (". . . disregard of non-price restrictions and substantial discounting commonly go together. . . ."); NAM Br. 7 (". . . substantial price cutting is likely to be indicative of failure to provide sales and educational services, . . ."); U.S. Br. 10-11 n.14 (". . . a dealer who maintains low prices either is a highly-prized dealer to the manufacturer, often having atypically low costs . . . or else is a potentially disruptive dealer that may be cutting costs by free-riding on the marketing programs of other dealers.")

The correlation of low price with poor service is crude speculation, unaccompanied by any proof in this record or in the economic or legal literature. The proffered hypothesis that low price begets low service is hardly a sound basis for spurning settled antitrust law and fashioning new antitrust policy. Indeed, to imply that high prices guarantee better service defies common experience. Service and price are two entirely different concerns, on separate continua.

NMRI respectfully submits that the discount retail industry's success derives from providing that combination of service and low prices which satisfies consumers. A retailer simply cannot remain in business if it completely eschews service and concentrates solely on low price—that retailer will never enjoy the loyalty of consumers who appreciate proper treatment. A retailer must, instead, offer the consumer the proper blend of product, advertising, product information, price, servicing, warranties, and shopping amenities.[9]

In sum, a complaint directed solely to a discounter's price, but not to its level of service, cannot be considered a concern with a "free-rider" that is failing to satisfy a manufacturer's non-price requirements. A price complaint contains not a hint of information that the manufacturer's service requirements are being ignored by the discounter. Rather, the complaint reveals the complainant's own inefficiencies and disdain for price competition. Thus, NMRI submits, proof of complaints about price is highly probative of the anticompetitive motive of the complainants: a desire to be free from price competition.

Proof that termination by the manufacturer followed such complaints *and was a result of the price complaints*

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[9] *See* C. Mueller, *Interviews With Discount Retailers*,—Antitrust Law & Econ. Rev.—(forthcoming, available Sept. 1983) (discussing discount retailers' provision of service).

can complete the price-fixing conspiracy. As the court of appeals below held: "Proof of distributorship termination *in response to* competing distributors' complaints about the terminated distributor's pricing policies is sufficient to raise an inference of concerted action." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1239 (7th Cir. 1982), Pet. App. 15-16 (emphasis added). The court below concluded that there was sufficient evidence that the termination was "in response" to the price complaints: Monsanto never told Spray-Rite that there was any valid reason for termination, such as that Spray-Rite failed to meet Monsanto's non-price criteria. 684 F.2d at 1239, Pet. App. 17. The court concluded that the evidence refuted Monsanto's allegation that it had an independent business reason for the termination. 684 F.2d at 1239 n.8, Pet. App. 17. That factual review need not be duplicated by this Court, particularly in light of Monsanto's admission that it encouraged distributors to observe suggested resale prices. Pet. Br. 11-12.

The petitioner and its supporting amici predict that the court of appeals quite straightforward ruling on the law of conspiracy will eradicate the manufacturer's right to impose non-price restraints by encouraging spurious suits and increasing the risk of treble damages. *E.g.*, NACA Br. 6 and NAM Br. 8. That fear seems grossly overstated. Indeed, the United States Court of Appeals for the Ninth Circuit only last month affirmed a grant of summary judgment in a dealer termination case, distinguishing *Spray-Rite* as a case requiring "sufficient evidence to show that the termination was *in response to* [price-related] complaints by competitors." *Filco v. Amana Refrigeration, Inc.*, No. 81-4604, slip op. at 7 (9th Cir. June 10, 1983). The *Filco* opinion punctures over-inflated fears that manufacturers will be handicapped by the decision below in enforcing legitimate, non-price distribution requirements.

In sum, the court of appeals decision is hardly extraordinary. The court concluded that when distributors complain about another distributor's prices—but not about that distributor's provision of service—and when the manufacturer terminates that distributor as a result of those complaints, and for no other expressed reason, the jury may—but is not compelled to—find that there was an illegal agreement to maintain prices. A manufacturer interested in requiring its distributors to comply with reasonable non-price requirements is not handicapped by that rule. That manufacturer need only instruct its distributors not to report price complaints but instead, to report any failures to provide adequate service. Even should the manufacturer receive price complaints, it may terminate a distributor if it can provide an independent and adequate non-price rationale for the termination.

B. Non-Price Restraints Are Anticompetitive When They Are Part of an Agreement to Fix or to Maintain Resale Prices.

Petitioner (Pet. Br. 3) seizes upon one sentence in the court of appeals opinion which suggests that non-price vertical restraints may be condemned as illegal per se simply because a plaintiff "alleges" that those restraints are part of a conspiracy to fix prices. 684 F.2d at 1237, Pet. App. 12. While that sentence is not as precise as it might be, it appears to be taken out of context.

First, the court of appeals also stated, 684 F.2d at 1237, Pet. App. 13 (emphasis added):

> In this case, the court instructed the jury that Monsanto's otherwise lawful compensation programs and shipping policies were per se unlawful *if undertaken as part of an illegal scheme to fix prices.* We find . . . that this instruction is accurate. "In any price-fixing case restrictive practices ancillary to the price-fixing scheme are also quite properly re-

strained." *White Motor Co. v. United States*, 372 U.S. 253, 260 (1963) . . . .

That is a correct statement of the law. *E.g.*, *United States v. Sealy, Inc.*, 388 U.S. 350, 356-57 (1967).

Second, the trial court did not instruct the jury that mere "allegations" that non-price restraints were part of the price-fixing scheme permitted invocation of the per se rule. To the contrary, the trial court instructed the jury that certain non-price restrictions are per se illegal only if they are used to effectuate resale price maintenance and that a mere effect on resale prices does not necessarily make a manufacturer's distribution program part of a resale price maintenance scheme. Tr. 4356 and 4364-65, cited in part at 684 F.2d at 1236 n.5, Pet. App. 11.

Third, the record reflects that Spray-Rite offered evidence—and not mere allegations—that the non-price restrictions were part of the price fixing scheme. *See* Brief in Opposition to Petition for Writ of Certiorari of Spray-Rite Service Corporation 18-19 n.11 and record citations. That is, Monsanto's "primary responsibility" program was argued to serve the purpose of limiting price cutting. *Id.*, citing Tr. 1936-1937.

Fourth, the jury specifically found, by special interrogatory, that the non-price restraints were "created . . . pursuant to a conspiracy to fix, maintain or stabilize resale prices on Monsanto herbicides . . .[.]" 684 F.2d at 1233, Pet. App. 4-5. The language of that interrogatory precludes any argument that the jury did not know the law: the interrogatory itself required a conclusion that the non-price restraints were "pursuant to" a price fixing conspiracy.

In sum, the record demonstrates that a properly instructed jury found that Monsanto's non-price distribution restraints were part of the resale price maintenance scheme and did not represent the manufacturer's unilateral judgment on the proper marketing of its product.

II. THE RULE THAT RESALE PRICE MAINTENANCE IS ILLEGAL PER SE IS CORRECT AND REPRESENTS THE EXPLICIT WILL OF CONGRESS.

This Court has long recognized that, because price competition is the "central nervous system" of our economy, any agreement that interferes with the setting of price by free market forces is "illegal on its face." *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978), *citing United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940). This precept is not limited to interbrand price competition. As this court has recognized at every opportunity, intrabrand price competition is also a desired end of our nation's antitrust laws. Thus, on every occasion when resale price maintenance agreements have been before this Court, they have been condemned as illegal per se.[10] This Court's established precedent that resale price fixing is illegal per se should not be lightly discarded, particularly where the defendant charged with the unlawful conduct does not choose to challenge the rule of law. *See* Pet. Br. i ("Questions Presented").

The United States, however, as amicus curiae in support of reversal, directly assaults 70 years of this Court's precedent and seeks a drastic change in antitrust law. NMRI submits that the present law is correct and represents the will of Congress: an agreement to fix or to maintain resale prices is illegal per se.

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[10] Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 404, 409 (1911); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213 (1951); Simpson v. Union Oil Co., 377 U.S. 13, 17, 18 (1964); Albrecht v. Herald Co., 390 U.S. 145, 151-52 (1968); Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 51 n.18 (1976); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 102-03 (1980); Rice v. Norman Williams Co., —— U.S. ——, 102 S.Ct. 3294, 3299 (1982).

A. Resale Price Maintenance Should Be Illegal Per Se Because the Demonstrated Harms Caused by the Practice Far Outweigh any Theoretical Benefits.

Fully one-third of the United States brief is devoted to a theoretical explanation of the benefits of resale price maintenance and to an attack on this Court's "inconsistent" justification for the per se rule condemning the practice (U.S. Br. 19-29).[11] The United States' discussion eloquently recites lofty law review articles, but fails totally to consider the actual evidence showing that resale price maintenance causes definite harm. The evils of resale price maintenance include increased prices; injury to newer, more efficient forms of retailing; the provision of undesired services; and the facilitation of horizontal price fixing.

First, studies conducted by the United States in the past demonstrate that resale price fixing substantially raises consumer prices.[12] This Court, too, has recognized that obvious economic fact. Indeed, one of the bases for the seminal *Dr. Miles* opinion, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), was that

[11] The United States asserts: "Indeed, the Court's few discussions of the basis for the per se ban during the last 70 years have not been consistent in justifying the rule." U.S. Br. 24.

[12] In 1975, when Congress enacted the Consumer Goods Pricing Act, it received testimony from then Assistant Attorney General for Antitrust Thomas Kauper which described studies detailing the cost to consumers of "Fair Trade" laws. Hearings on S.408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess. 173-75 (1975) [hereinafter cited as *Senate Hearings*]. According to one Antitrust Division survey, resale prices when freely determined by retailers ranged from 0.2% to 37.4% below the resale price when set by a manufacturer. Another survey showed that when resale prices were fixed, the consumer paid on the average of 19-27% higher for the goods. *Id.* at 174. One economist from the University of California estimated that the cost of the "Fair Trade" laws, allowing resale price fixing, was approximately $6.5 billion in 1975 alone. *Id.* at 151.

the effects caused by resale price fixing, higher prices, are the same as if the distributors collectively agreed upon a fixed price. *Id.* at 407-09.

The Department of Justice criticizes that thread of *Dr. Miles* as being inconsistent with the manufacturer's economic objective to earn higher profits (U.S. Br. 25) and also inconsistent with this Court's other rationale offered for the per se rule, i.e., that resale price maintenance deprives "independent dealers of the exercise of free judgment." (U.S. Br. 26, *citing Simpson v. Union Oil Co.*, 377 U.S. 13, 16 (1964)). There are no inconsistencies: this Court's rationales in *Dr. Miles* and *Simpson* are compatible and the *Dr. Miles* opinion tracks economic theories of short-run profit maximization.

The resale price maintenance agreement and the termination of a discounter may reflect the manufacturer's choice to accede to the wishes of certain disgruntled and inefficient distributors which, because of long-established relations, may have more combined clout at that time with the manufacturer than does the terminated distributor. The agreement and the termination, then, may cause effects identical to a dealer price fixing cartel (higher prices) while at the same time stripping the independent, i.e., competitive, distributor of its free judgment to price the goods as it sees fit. While resale price maintenance raises prices to consumers, and thereby lowers output, the manufacturer, is, nonetheless, content with that scheme because short-run output, in its opinion, might be even lower if it failed to satisfy its established, but inefficient, distributors' needs to be free of competition.[13]

This discussion leads to the second definite harm caused by resale price maintenance: the inhibitions on new and

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[13] *See generally* J. R. Gould and B. S. Yamey, *Professor Bork on Vertical Price Fixing*, 76 Yale L.J. 722 (1966) (discussing other instances of resale price maintenance where output is reduced) [hereinafter cited as Gould and Yamey].

more efficient forms of retailing. Resale price fixing may shore up inefficient distributors by freeing them from the obligations of competition with more efficient, low cost retailers.[14] In the present case, for example, there is record evidence that Spray-Rite was an efficient distributor of Monsanto herbicides and was perceived as innovative and a provider of good services. Spray-Rite's termination may thus have cost the marketplace an efficient distributor.

A third harm of resale price maintenance is the frequent imposition of undesired services. That is, resale price maintenance "restricts the range of consumers' choice." [15] If, as claimed by the United States, a resale price maintenance scheme will ordinarily be accompanied by some requirement that the distributor offer a particular amount of pre-sale and/or post-sale services, the consumer must accept not only those services, but must also pay the price decreed by the manufacturer. The consumer will have no other choice. However, absent resale price maintenance, the consumer would have a choice, at least a choice on price. That is, while the manufacturer might, absent resale price maintenance, still insist by contract that the retailer provide post-sale and/or pre-sale serv-

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[14] *See Senate Hearings, supra* note 12, at 322-39 (Library of Congress Study which demonstrated, inter alia, that there were greater numbers of business failures in states allowing resale price maintenance than in states prohibiting resale price maintenance and that there were higher sales per stores in areas where resale price maintenance was prohibited than in areas where the practice was allowed). *See also* Gould and Yamey, *supra* note 13, at 729; Yamey, *Introduction*, in Resale Price Maintenance 4 (B.S. Yamey ed. 1966) (". . . the independent pricing decisions of competing retailers and the responses of consumers lead to the elimination of the least efficient retailers, to the expansion (including the establishment) of more efficient firms, and to the availability of a range of competing offerings of different combinations of retail prices and services to meet the varied and varying preferences of consumers.") [hereinafter cited as Yamey].

[15] Gould and Yamey, *supra* note 13, at 729.

ices, an efficient retailer will be able to satisfy those contractual demands and still beat his competitor on price. With resale price maintenance, in contrast, an efficient retailer providing the post-sale and pre-sale services required by the manufacturer still cannot benefit from the efficiencies of its operation by offering a lower price; it is forced to accept a higher profit margin that it would otherwise like. That higher profit margin represents a direct consumer loss.

Moreover, if the resale price maintenance scheme is not accompanied by post-sale and pre-sale service contractual requirements, but is instead merely intended to be an inducement to provide those requirements, the consumer is even more so the loser. The company that did not provide service in the past will not be obligated to do so in the future; it may simply pocket higher prices for the manufacturer's goods. Conversely, a retailer that feels compelled to offer more services to justify its higher profit margin may be providing something the consumer does not want: unnecessary frills.

There is yet another cost to resale price maintenance. It facilitates horizontal price fixing at all levels of the distribution chain. As stated by then Assistant Attorney General for Antitrust Thomas Kauper during the 1975 hearings:

> Price competition at retail may result in increasing price competition at the manufacturer's level. Especially in concentrated industries, manufacturers may well be reluctant to see vigorous price competition at the retail level, since this may threaten general price stability in the industry, and price stability is frequently sought and desired in oligopolistic industries.[16]

Resale price maintenance may affect competition at the manufacturing level in other ways. For example, eliminating or restricting price competition in retailing may

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[16] *Senate Hearings*, *supra* note 12, at 175.

"prevent or retard the growth of large firms in retailing, and thereby inhibit the building-up or strengthening of bargaining power which could be used to disrupt price agreements or non-collusive oligopolistic price structures in supplying industries." Yamey, *supra* note 14, at 10.

Finally, resale price maintenance agreements "reduce price competition not only *among* sellers of the affected product, but quite as much *between* that product and competing brands." *White Motor Co. v. United States*, 372 U.S. 253, 268 (1963) (Brennan J., concurring).[17] In other words, resale price fixing can reduce interbrand price competition, as well as thwart intrabrand price competition, because distributors are restrained from lowering prices to meet, or beat, competition from other brands.

The harms described in the preceding paragraphs are substantial; to overcome them, the United States offers simply a theoretical and unproven argument that high resale price margins are necessary to guarantee good service. This argument, the so-called "free-rider" argument, deserves scant attention.

To begin with, the entire argument rests upon the premise that low price retailers do not provide service. That hypothesis is incorrect and ignores the substantial successes to date of discount retailers. A low price is more consistent with efficient operations than with poor service. The argument also seems to envision a class of ignorant consumers who do not have the sense to purchase services that the manufacturer believes they need to enjoy the product. Finally, the argument fails because a high resale price is no guarantee that services will in fact be performed. The simple availability of higher profits to a retailer does not guarantee good retail performance—to the contrary, it may serve as an artificial incentive to be inefficient.

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[17] *See Albrecht, supra* note 10, 390 U.S. at 152 n.7 (resale price maintenance may "alleviate" interbrand price competition).

Moreover, even if there is a "free rider" problem, a manufacturer ordinarily has alternatives other than price fixing available to it to monitor the provision of desired services. Those alternatives—when not a part of a price fixing scheme—are not subject to a per se rule. For example, a manufacturer ordinarily may appoint an exclusive dealer in a particular area. *E.g., Oreck Corp. v. Whirlpool Corp.*, 563 F.2d 54 (2d Cir. 1977), 579 F.2d 126 (2d Cir.) (en banc), *cert. denied*, 439 U.S. 946 (1978). A manufacturer ordinarily may prohibit its authorized distributors from transshipping goods to unauthorized distributors. *E.g., Rice v. Norman Williams Co.*, —— U.S. ——, 102 S.Ct. 3294 (1982). A manufacturer ordinarily is able to bestow an exclusive territory upon a dealer. *E.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). And a manufacturer, for safety and other service reasons, may impose various non-price restraints on its distributors. *E.g., Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir.), *cert. denied*, 400 U.S. 831 (1970) (restrictions on sales to professional end users for safety reasons); *Mitchell v. U.S. Surgical Corp.*, 1976-1 Trade Cas. ¶ 60,879 (S.D. Ohio 1976) (restrictions on sales outside territory to ensure prompt service and to protect safety of ultimate consumers).

In short, there is a host of non-price alternatives available to the manufacturer who perceives that it has a "free-rider" problem and wants better control over its distributors. Under present law, however, the only distribution restraint alternative which is *never* available to a manufacturer is the fixing or maintenance of the resale price and, either by coercion or agreement, requiring that its distributors follow that price.[18]

[18] Of course, a manufacturer may, if it otherwise acts unilaterally and employs no means to coerce adherence to suggested resale prices, refuse to deal with a company that it perceives to be a discour[illegible]s, *e.g.*, Garrett's Inc. v. Farah Mfg. Co., 412 F. Supp. 656 (D. [illegible]976) (upholding refusal to sell to price cutter in

B. Congress Has Determined That Resale Price Maintenance Should Be Illegal Per Se.

NMRI submits that the Consumer Goods Pricing Act of 1975 is an express recognition that resale price maintenance is per se illegal. Indeed, this Court has already indicated that the Consumer Goods Pricing Act is a ratification that resale price fixing is per se unlawful:

> . . . Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual states . . . .

GTE Sylvania, supra, 433 U.S. at 51 n.18.

The Consumer Goods Pricing Act is more than approval of this Court's per se analysis. It is positive, substantive law in its own right, establishing that resale price maintenance is per se unlawful. Adopting the language of this Court in *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 379-82 (1982), the fact that Congress conducted a comprehensive reexamination of vertical price fixing under the Sherman Act and left intact those statutory provisions under which the federal courts had crafted the per se rule against resale price maintenance is itself evidence that Congress affirmatively intended to preserve that law. That is, Congress, in repealing the federal statutory basis for "Fair Trade" laws found in the Miller-Tydings and McGuire Acts, was clearly conscious of, and intended to adopt, judicial precedent which established that resale price maintenance is per se unlawful. The passage of the Consumer Goods Pricing Act of 1975 is thus tantamount to an explicit legislative directive that resale price maintenance is per se unlawful. *See Bob Jones University v. United States,*

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absence of coercion by seller or other parties enlisted by supplier); Graham v. Triangle Publications, Inc., 233 F. Supp. 825 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965). *See also* In Re Russell Stover Candies, Inc., No. 9140, slip op. (FTC July 7, 1982).

—— U.S. ——, 51 U.S.L.W. 4593, 4600-01 (U.S. May 24, 1983) (congressional legislation following administrative and judicial interpretation is "manifest[] . . . acquiescence" in interpretation).

In *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), this Court stated:

> Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change . . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.

Even if the 1975 Consumer Goods Pricing Act is not considered to be positive substantive law in its own right, the legislative history of that Act is relevant in construing the Sherman Act. In *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), this Court stated that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." *Id.* at 380-81.[19]

The legislative history of the Consumer Goods Pricing Act quite emphatically demonstrates that Congress intended to perpetuate a per se rule. To begin with, both the Senate and House Reports on the bill provide that resale price maintenance should be illegal per se. The Senate Report states (emphasis added):

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[19] The United States (U.S. Br. 28 n.41) argues that the views of legislators in enacting the Consumer Goods Pricing Act do not offer much assistance to this Court in construing the Sherman Act. This Court has repeatedly recognized that "while the views of subsequent Congresses cannot override the unmistakable intent of the enacting one, . . . such views are entitled to significant weight, . . . and particularly so when the precise intent of the enacting Congress is obscure." Seatrain Shipbuilding Corp. v. Shell Oil Co., 444 U.S. 572, 596 (1980). *See* Federal Housing Admin. v. The Darlington, Inc., 358 U.S. 84, 90 (1958).

> This proposed legislation repeals the Miller-Tydings Act which enables the States to enact fair trade laws and the McGuire Act which permits states to enact nonsigner provisions. *Without these exemptions the agreements they authorize would violate the antitrust laws.*[20]

The House Report was even more explicit:

> An agreement between a manufacturer and a retailer that the retailer will not resell the manufacturer's product below a specified price is an abvious [sic] form of price fixing. As such it is *per se* illegal under Section 1 of the Sherman Act.[21]

Both the House and Senate sponsors, in explaining the legislation to their colleagues, emphasized that the effect of the Consumer Goods Pricing Act was to submit resale price fixing agreements to the per se standard. For example, Rep. Rodino, Chairman of the House Judiciary Committee and the Subcommittee on Monopolies and Commercial Law and a co-sponsor of the bill, stated, while presiding over Subcommittee hearings, that resale price maintenance would be per se illegal on passage of the Consumer Goods Pricing Act:

> Agreements, whether vertical or horizontal, to fix and maintain prices are a classic restraint of trade. They have long been considered per se illegal under our antitrust laws.[22]

Sen. Brooke, the Senate sponsor of the bill, stated:

> Without these Federal statutes [the Fair Trade laws], these interstate price-fixing conspiracies would be in violation of the most basic of our antitrust

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[20] S. Rep. No. 466, 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *Senate Report*].

[21] H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975) [hereinafter cited as *House Report*].

[22] Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Judiciary Comm., 94th Cong., 1st Sess. 1 (1975) [hereinafter cited as *House Hearings*].

laws—the Sherman Antitrust Act and the Federal Trade Commission Act.[23]

Further evidence of Congressional intent is found throughout the remarks of sponsors of the legislation, other Congressmen, and witnesses testifying for the House and Senate Committees.[24]

The final proof of the purpose of the Consumer Goods Pricing Act of 1975 is found in the statement of then President Gerald R. Ford who, upon signing the bill, stated that the legislation

> ... will make it illegal for manufacturers to fix the prices of consumer products sold by retailers. This new legislation will repeal laws . . . which amended the Federal antitrust laws so States could authorize otherwise illegal agreements between manufacturers and retailers setting the price at which a product would be sold to consumers.[25]

In sum, Congress has spoken: resale price maintenance is illegal per se. The Consumer Goods Pricing Act of 1975 is positive substantive law in its own right and, in addition, represents Congress' construction of the substantive scope of the Sherman Act.

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[23] 121 Cong. Rec. 38,049-50 (1975).

[24] *E.g.*, 121 Cong. Rec. 23,660 (1975) (remarks of Rep. Hutchinson) ("Upon enactment of this bill it would be a violation of the Federal Antitrust Act for a manufacturer to set a minimum retail price for any item he makes; that would be price fixing."); 121 Cong. Rec. 23,662 (1975) (remarks of Rep. Seiberling) (". . . resale price maintenance [is] . . . a per se violation of the Federal antitrust laws."); *Senate Hearings, supra* note 12, at 13 (exchange between Sen. Hruska and Federal Trade Commission Chairman Louis A. Engman that a manufacturer's exacting a promise from a dealer not to sell below a particular price "would not be legal" and "would then constitute price-fixing under the Sherman Antitrust Law . . . [.]").

[25] 11 Weekly Comp. Pres. Doc. 1368 (Dec. 12, 1975).

C. Congress, and Not the Judiciary, Is the Proper Branch of Government to Consider a Change in the Law.

The United States suggests that this Court has clear authority to change the rule of law that resale price maintenance is illegal per se. (U.S. Br. 20 & nn.28, 29). While this Court has unquestioned authority to determine whether a particular defendant has violated the antitrust laws, it is another matter altogether for this Court to abandon years of judicial precedent, particularly where Congress has endorsed the precedent and the defendant before the Court does not seek to change the extant standard.

Only last year this Court recognized that it is Congress, and not the judiciary, which should consider changes to established per se rules. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2478-79 (1982) (". . . arguments against application of the per se rule in this case therefore are better directed to the legislature.")

Particularly with respect to resale price maintenance, reconsideration of the policy is better left to Congress. First, there is no question that Congress has been aware of this Court's precedent.[26] Where Congress is aware of this Court's precedent and has chosen not to change it, this Court is properly hesitant to change the law. *E.g., Illinois Brick Co. v. Illinois*, 431 U.S. 720, 736-37 (1977) (". . . considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation."); *Flood v. Kuhn*, 407 U.S. 258, 284 (1972) (in upholding the long-time exemption of professional baseball from the

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[26] *See, e.g., House Report, supra* note 21, at 2 ("The Supreme Court first condemned resale price maintenance agreements under the Sherman Act 64 years ago . . . . In a line of subsequent decisions the Court has consistently held that such agreements are in direct violation of the system of free competition which the antitrust laws are designed to promote. [citing five opinions of this Court].").

antitrust laws the Court noted that "[i]f there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to Congressional intent in [precedent discussing the baseball exemption] . . . ."). *See Radovich v. National Football League*, 352 U.S. 445, 450-52 (1957). In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 488-89 (1940), this Court refused to exclude labor unions from the antitrust laws, in part because

> [t]he long time failure of Congress to alter the Act after it had been judicially construed, and the enactment by Congress of legislation which implicitly recognizes the judicial construction as effective, is persuasive of legislative recognition that the judicial construction is the correct one. This is the more so where, . . . after the matter has been fully brought to the attention of the public and the Congress, the latter has not seen fit to change the statute.

As the United States correctly observes, Congress has enjoyed "prolonged debate on the competitive effects of resale price maintenance, . . ." (U.S. Br. 28 n.41). As a result of that debate, Congress has chosen to perpetuate the rule of law that resale price maintenance is per se illegal.[27]

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[27] Indeed, Congress in 1975 not only endorsed the per se rule but explicitly rejected the primary justification for a change in law now offered by the United States: the "free-rider" doctrine. The Senate Report observed that opponents of the bill

> . . . were primarily service-oriented manufacturers who claimed retailers would not give adequate service unless they were guaranteed a good margin of profit. However, the manufacturer could solve this problem by placing a clause in the distributorship contract requiring the retailer to maintain adequate service. Moreover, the manufacturer has the right to select distributors who are likely to emphasize service.

Senate Report, supra note 20, at 3. *See also House Report, supra* note 21, at 4 (". . . consumers should have the freedom to choose

In short, Congress has considered this issue before and has previously rejected the justification now urged upon this Court by the United States. If there is to be a reconsideration of the rule of law, it is Congress, and not the judiciary, which should perform that task.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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between paying more for those services and buying nothing but the unadorned product at a lower price from a competitor . . . customers are in fact willing to pay a somewhat higher price for the convenience, courtesy and service which small retailers are uniquely situated to provide.").

No. 82-914

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY,

Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF SERVICE MERCHANDISE COMPANY, INC. IN SUPPORT OF RESPONDENT

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BRIEF AMICUS CURIAE OF SERVICE MERCHANDISE COMPANY, INC. IN SUPPORT OF RESPONDENT

This brief is filed with the consent of both parties on file with this Court.

INTEREST OF AMICUS CURIAE

Service Merchandise Company, Inc. ("SMC") on November 19, 1982, petitioned for a writ of certiorari in case No. 82-848. That petition is presently pending before the Court.

SMC is engaged in the showroom, catalog and mail order business selling name-brand products of national manufacturers such as Amana Refrigeration, Inc. ("Amana") from its 110 showrooms located in 25 states. Petition at 2. SMC's business of selling Amana microwave ovens

was destroyed pursuant to an agreeement and concert of action among Amana and its distributors and dealers to fix the wholesale and retail prices of the ovens and to boycott and refuse to sell such ovens to SMC. *Id.* at 2-3. Like respondent Spray-Rite here, SMC sued Amana alleging that such conduct constituted per se violations of Section 1 of the Sherman Act. *Id.*

The district court granted summary judgment dismissing SMC's per se claims and the Court of Appeals for the Sixth Circuit affirmed. The essential basis for both the dismissal and affirmance was that there was "insufficient evidence that a conspiracy or concerted action existed." *Id.* at 3-4. With concerted action removed, the court of appeals concluded that Amana's restraints involved only "non-price vertical restraints originating as unilateral action" which should be tested by the rule of reason standard pursuant to this Court's decision in *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). *Id.*

Both Amana and the courts below in SMC's case, and petitioner Monsanto and the United States as amicus curiae here, seek to shape these cases in the *Sylvania* mold by asserting that as a matter of law an inference of concerted action cannot flow merely from evidence that the manufacturer took action following the receipt of customer complaints. *See* Monsanto Br. at 18; Govt. Br. at 5-6. As Spray-Rite has demonstrated, such an assertion is a resounding irrelevancy because this case involves far more than such bare bones evidence; it involves direct evidence fully justifying a finding of concerted action by a properly instructed jury.[1] It is a matter of vital interest to

[1] Like Monsanto here, Amana did not urge in the SMC case (as the United States now does) that resale price maintenance should be removed from the per se category. Unlike the present case, however, the issues of per se price fixing and boycott liability were withheld

SMC that this Court not extend its decisions in *Sylvania* and *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919) by imposing a more stringent burden of proof of concerted per se anticompetitive action than would ordinarily be required merely because the actors happen to be participants in a vertical chain of distribution.

ARGUMENT

We will burden neither the Court nor this brief with a repetition of the arguments made forcefully and artfully by respondent Spray-Rite. However, we do set forth the linchpin of petitioner Monsanto's no conspiracy argument at page 18 of its brief because it lays bare the hollow nature of Monsanto's position:

> The Seventh Circuit's conspiracy standard unreasonably allows a jury to find a price-fixing conspiracy based on speculation. It permits the inference of conspiracy from normal marketplace occurrences—price complaints, price concern and termination—that are fully consistent with independent action. Such evidence is probative of conspiracy only if other evidence reasonably supports the inference that *the manufacturer was acceding to the desires of complaining distributors* in terminating the plaintiff, rather than exercising its independent business judgment. (Emphasis supplied.)

It is axiomatic, of course, that Spray-Rite's burden of proof on the conspiracy issue was only one of adducing a preponderance of evidence, *i.e.*, it is more likely than not that there was a conspiracy. It is equally axiomatic that it is not the function of this Court to substitute its appraisal

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from the jury by the grant of summary judgment in the SMC case. We note that Monsanto does not contest the jury finding of group boycott made upon substantially the same kind and quality of evidence presented in the SMC case. *See* Petition at 5, 6, 12, 13, 20, 21.

of the facts for that of the trier of fact. *New Haven Inclusion Cases*, 399 U.S. 392, 435 (1970).

Monsanto itself has framed the conspiracy inquiry as being whether it terminated Spray-Rite in response to the desires of its complaining distributors rather than in the exercise of its independent business judgment. Monsanto thus views as paramount the motive and intent behind its challenged activities. This Court just recently in *Pullman-Standard, Inc.* v. *Swint*, 456 U.S. 273, 288 (1982) reaffirmed its holding in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341 (1949) (an antitrust case) that " 'findings as to the design, motive and intent with which men act' [are] peculiarly factual issues for the trier of fact . . . ." Unfortunately for Monsanto, the jury resolved this factual issue against it by specifically finding that Monsanto terminated Spray-Rite pursuant to a conspiracy with one or more of its distributors. Monsanto's attempt to reshape this case into one involving nothing more than "normal marketplace occurrences—price complaints, price concern and termination" should be rejected.

Spray-Rite's brief recounts the manner in which Monsanto responded to the barrage of complaints about Spray-Rite's prices and demands for corrective action received from its distributors. The response included investigations, price surveillance, interrogation, threats of retaliation against Spray-Rite for its low prices and ultimate termination. This is not, as Monsanto contends, normal marketplace behavior consistent with independent action. Substituting herbicides for automobiles "[t]his process for achieving and enforcing the desired objective can by no stretch of the imagination be described as 'unilateral' or merely 'parallel'." *United States* v. *General Motors Corp.*, 384 U.S. 127, 144-145 (1966).

Should any doubt remain that in terminating Spray-Rite Monsanto "was acceding to the desires of complaining distributors" it is dispelled by Monsanto's contemporaneous behaviour. Informed of Monsanto's decision to terminate its distributorship, Spray-Rite met with Donald Fischer, Monsanto's product sales director, to ask that the decision be reconsidered. The first thing Fischer said on this occasion was that Monsanto had received many complaints about Spray-Rite's prices. (Tr. 767-768, 774, 1295.) Fischer had earlier personally made the decision to terminate Spray-Rite. (Tr. 3824, 3826.)

It is hardly surprising that jurors viewing the evidence as a unified whole would conclude that Fischer's utterance was tantamount to an admission that Monsanto was acceding to the desires of its complaining distributors rather than acting independently. Indeed, we suggest it would be surprising if the jurors, applying the same tests to this evidence as they apply in their own everyday dealings, had arrived at any other conclusion. In short, the jury finding of conspiracy was supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 82-914

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

MONSANTO COMPANY, *Petitioner*,

vs.

SPRAY-RITE SERVICE CORPORATION, *Respondent*.

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

**Brief of the Small Business Legal
Defense Committee As
Amicus Curiae In Support of Respondent**

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INTEREST OF AMICUS CURIAE

The Small Business Legal Defense Committee ("SBLDC") is a non-profit legal foundation of small business members from throughout the United States which works for governmental policies that facilitate the growth of small business and, in particular, that are consistent with the Small Business Economic Policy Act of 1980 (5 U.S.C. § 631(a)). That act requires the federal government to "foster the economic interests of small business . . . assuring that adequate capital and other resources at competitive prices are available to small business, reduce the concentration of economic resources and expand competition, and provide an opportunity for entrepreneurship, inventiveness, and the creation and growth of small business." Because the policies of that act and the interests of small business are involved in this case, SBLDC appears as *amicus* in support of respondent.

SUMMARY OF THE ARGUMENT

1. The *per se* rule against resale price maintenance ("rpm") has been in effect for more than seventy years, during which business in this country, large and small, has thrived. There is nothing in the experience of these years of effective enforcement to suggest the need for the radical revision that the petitioner and the government here seek.

2. Congress in 1975 repealed the Miller-Tydings and McGuire Acts which had granted to states power to exempt rpm from the antitrust laws. By this and related actions Congress has shown its support for the *per se* rule. In the course of so doing, Congress has considered and rejected numerous arguments in favor of rpm, including those pressed in this case by petitioner and *amici* supporting petitioner.

3. The "free-rider" or "market failure" argument for rpm, the argument most stressed today, is theoretically inadequate and inconsistent with empirical reality. Far from facilitating competition, rpm can be used to cartelize or to exploit information deficiencies among consumers, thus imposing covert price discrimination. Furthermore, rpm is an inept device for dealing with real free-rider problems which can, on the contrary, be effectively dealt with by territorial or location restraints.

4. When a supplier polices "suggested" prices by obtaining reports from dealers about price cutting, the supplier and the dealers are engaging in concerted action in the literal sense. To hold, as petitioner urges, that such action does not violate the antitrust laws absent proof that the parties acting in concert are all acting from the same motive would reduce the *per se* rule against rpm into an easily evaded technicality.

ARGUMENT

Introduction

Seven decades ago this Court held that agreements between a supplier and its dealers fixing resale prices are *per se* violations of the Sherman Act. (15 U.S.C. §1) *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 375 (1911). The act protects dealer pricing autonomy whether interference is initiated by other dealers (*United States v. General Motors Corp.*, 384 U.S. 127 (1966)) or by the supplier, as in *Dr. Miles*. Less than a decade after *Dr. Miles*, the Court held that, acting unilaterally, a supplier may refuse to sell to dealers that resell below prices suggested by the supplier. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). In the years since, *Dr. Miles* has waxed, *Colgate* waned.

The question here concerns the borderline between *Dr. Miles* and *Colgate:* A supplier suggests resale prices. Some dealers comply. One does not. Complying dealers complain to the supplier. The supplier terminates the autonomous price-setter. Must the supplier's conduct as a matter of law be characterized as "unilateral" within the meaning of *Colgate,* or may the court or the jury on proper instructions find a "contract, combination or conspiracy" to maintain resale prices in violation of *Dr. Miles?*[1] The government, as *amicus,* would escalate the issue: it prays that *Dr. Miles* be overruled.

Given recent Congressional[2] and judicial[3] reaffirmation of the *per se* rule against resale price maintenance ("rpm") the government's attack on *Dr. Miles* is bold if not audacious.[4] Yet, in a sense, the government's position

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[1]Particulars are important. Whether the supplier acted in response to dealer complaints about price cutting or for some different reason (such as poor sales, or non-compliance with other, legal requirements) raises a factual question. Here, two courts below found the evidence sufficient to warrant the finding that competitor complaints of price cutting were the reasons for termination. *Cf. Branti v. Finkel,* 445 U.S. 507, 512 n. 6 (1980). A trial court may, of course, take the matter from the jury where the evidence as a whole is insufficient to warrant such an inference. *Cf. Bruce Drug, Inc. v. Hollister, Inc.,* 688 F.2d 853 (1st Cir. 1982).

[2]Consumer Goods Pricing Act of 1975, Pub. L. 94-145, 89 Stat. 810 (1975), amending 15 U.S.C. §§1,45(a).

[3]*California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 102-103 (1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 51 n.18 (1977).

[4]Antitrust has become a Congressional-executive battleground. William F. Baxter, incumbent head of the Antitrust Division, has challenged decisions of this Court during oversight hearings with respect to rpm, horizontal agreements "stabilizing" price, tying, and mergers. See generally, *Joint Hearing Before the Comm. on Small Bus. and the Subcomm. on State, Justice, Commerce, the Judiciary and Related Agencies of the Senate Comm. on Appropriations,* 97th Cong., 2d Sess. (1982). Thus, Mr. Baxter views "large enterprises"

puts emphasis where it ought to be; it signifies, quite correctly, that petitioner's seemingly more modest contention is also a direct attack against the continued enforcement of *Dr. Miles*. As this brief will show, *Dr. Miles* was sound when decided and is sound today. It should neither be overruled nor converted by novel construction into a mere trap for the uninformed.

I

EXPERIENCE WITH THE PER SE RULE AND THE COLGATE DOCTRINE MILITATE AGAINST OVERRULING DR. MILES OR WATERING IT DOWN THROUGH CONSTRUCTION.

Justice Hughes' opinion in *Dr. Miles* stressed the Sherman Act's concern with restraint of trade (220 U.S. at 390-404, 406-409) and the common law's resistance to equitable restraints on chattel. (*Id.* at 404-406). The majority upheld the pricing freedom of the dealer against the claim that the supplier needed to control down-stream prices in order to protect its own good will against "confusion and damage." (*Id.* at 407-408). It also rejected the dissenting contention of Justice Holmes that the value to consumers of resale competition was "exaggerated." (*Id.* at 411-413). Save for the narrow *Colgate* incursion, the *per se* rule has applied for seventy years with unmitigated force.[5]

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as being "characteristically more efficient" than small (*Id.* at 17); recognizes that rpm is *per se* unlawful (*Id.* at 95-96), but views it as "desirable" (*Id.* at 98); thinks the *per se* rule against price stabilization is "idiocy" (*Id.* at 11), and apparently regards some of this Court's earlier merger decisions as "wacko" and "rubbish." Where Congress has expressed itself as clearly as it has in support of the *per se* rule against rpm, the proper forum for Mr. Baxter's campaign for legal change is Congress, not the Court. Compare *Arizona v. Maricopa Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 2478-2479 (1982).

[5] In *Sylvania* this Court emphasized two factors that warranted overruling the *per se* rule against resale territorial restraints: the

Colgate is in tension with *Dr. Miles.* But this Court has confined *Colgate* and expanded *Dr. Miles.* An aberration when decided,[6] *Colgate* has not fared well. In *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920), the majority held that *Dr. Miles*, not *Colgate*, governed rpm "implied from a course of dealing or other circumstances." (*Id.* at 99-100). *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) held that a scheme for enforcing suggested prices deprived the supplier of a *Colgate* defense. What little those cases left of *Colgate* was further eroded by *United States v. Parke, Davis & Co., supra*: If the supplier uses any coercive tactics, *Dr. Miles*, not *Colgate*, applies. (362 U.S. at 38-39). Indeed, *Albrecht v. Herald Co., supra* held that if a supplier utilizes anyone other than its own employees to gain pricing adherence the *Colgate* defense fails. The factual analogies between those cases and this one need not be labored. Unless this Court turns its back on every one of its *Colgate* precedents—precedents cited

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newness of the rule, and the fact that lower federal courts had found it confusing and tended to confine its application very narrowly. (433 U.S. 47-49) Here, the reverse is true on both counts. Not only is *Dr. Miles* a rule of long standing, it is also one that has been broadly and vigorously enforced both here and in the lower courts. Indeed, it is the *Colgate* case, the "exception" to *Dr. Miles*, that this Court has narrowed (*e.g. United States v. Parke, Davis & Co.*, 361 U.S. 29 (1960); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968)) and that lower courts have found confusing. E.g. *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787 (2d Cir. 1960).

[6]One commentator says that apart from the fact that Charles Evans Hughes wrote the opinion in *Dr. Miles* and represented the successful defendant in *Colgate* "there seems to be little in the way of consistency between the two cases." J. Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitor's Complaints*, 49 Brooklyn L. Rev. 673 at 673 (Spring, 1983, forthcoming) (citation from page proof)

with approval as recently as *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., supra* at 102—a "suggested" price program with dealers used as a police compliance falls under the *per se* ban of *Dr. Miles.*

Nor is it surprising that this Court has limited *Colgate* virtually to its own facts. The case has had few if any defenders for it so transparently lacks a logical core.[7]

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[7]With a series of four hypotheticals Areeda demonstrates that *Colgate* cannot be reconciled with *Dr. Miles*: (1) If dealers expressly promise to resell at supplier-designated prices, *Dr. Miles* clearly applies. (2) Surely, then, *Dr. Miles* must also apply if dealers make such express promises, even if supplier agrees never to sue to enforce them. Since the promises are illegal and unenforceable in any event, the added term changes nothing; in both case (1) and case (2) the only possible sanction is that the supplier will cease dealing if a dealer violates his promise. (3) But, then, *Dr. Miles* must also apply if the supplier sells to dealers subject to a condition that the dealers will resell at supplier-designated prices. Again, the only sanction is termination, and antitrust liability is hardly to turn on the difference between a covenant and a condition. (4) The fourth step in the Areeda sequence mimics *Colgate* itself: if the supplier "suggests" resale prices and "announces" that non-complying dealers will be cut off, the supplier accomplishes precisely what is accomplished in each of the three prior hypotheticals; any difference either in the verbiage or to psychology of the parties about the nature of their relationship is so trivial as to be non-existent. Areeda, *Antitrust Analysis* § 52 (3d ed. 1981). To characterize the first three as "contracts, combinations or conspiracies," yet the last, the *Colgate* hypothetical, as "mere unilateral action" is unjustifiable. See also Turner, *Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 684-706 (1962) (whether induced by threat of refusal to deal or not, acquiescence in a supplier's policy as to resale should be enough to establish vertical "agreement").

II

CONGRESSIONAL ACTION FORECLOSES REVERSAL OF DR. MILES AND SPEAKS AGAINST A LIMITING CONSTRUCTION.

A. In 1975 Congress Repealed the McGuire and Miller-Tydings Acts in Order to Make Rpm Per Se Unlawful.

The *Dr. Miles per se* rule was routinely applied for a quarter of a century.[8] Then Congress passed the Miller-Tydings Act giving states power, in certain circumstances, to legalize rpm.[9] When this Court in *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), construed Miller-Tydings narrowly, Congress passed the McGuire Act,[10] to make clear that rpm contracts sanctioned by state law could be enforced against "non-signers".

Congress passed those acts to aid small business.[11] But the Consumer Goods Pricing Act, repealing Miller-Tydings and McGuire amendments, was passed in 1975.[12] By then, Congress saw that both small business and consumers would thrive if dealers were free to decide for themselves whether to emphasize price or service competition.[13] As this Court recently said, Congress, by passing that act, "expressed its approval of a *per se* analysis of vertical price restrictions."[14]

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[8]E.g., *Bauer & Cie v. O'Donnell*, 299 U.S. 1 (1913); *Boston Store of Chicago v. American Graphophone Co.*, 246 U.S. 8 (1918); *Frey & Son, Inc. v. Cudahy Packing Co.*, 256 U.S. 208 (1912).

[9]Ch. 690, 50 Stat. 673, 693-94 (1934), amending 15 U.S.C. § 1.

[10]Pub. L. 82-542, 66 Stat. 631 (1952), amending 15 U.S.C. § 45.

[11]See H.R. Rep. No. 1437, 82d Cong., 2d Sess. 2-4 (1952); S. Rep. No. 2053, 74th Cong., 2d Sess. 2 (1937).

[12]Pub. L. 94-145, 89 Stat. 810 (1975), amending 15 U.S.C. §§ 1, 45(a).

[13]S. Rep. No. 466, 94th Cong., 1st Sess. 3 (1975).

[14]*Continental T.V., Inc. v. GTE Sylvania, Inc., supra* at 51 n.18. See also *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra* at 102-103.

The legislative history of the 1975 act is replete with indicators of precisely that Congressional intent. At the hearings, enforcement agency officials stated as clearly as would seem possible that the 1975 act would yield *per se* illegality and explained what *per se* illegality would mean in practice.[15] The committee reports show that the House and Senate Committees understood this testimony and wanted to impose the *per se* rule.[16] Finally, the floor debates reflect the same understanding and the same purpose.[17]

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[15]*See Fair Trade: Hearings on S. 408 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 13 (1975) (testimony of Lewis Engman, Chairman, FTC) [hereinafter cited as *1975 Senate Hearings*]; *Id.* at 18 (testimony of Thomas Kauper, Ass't Attorney General); *Fair Trade: Hearings on H.R. 2384 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 1st Sess. 116, 120 (1975) (testimony of Keith Clearwaters, Deputy Ass't Attorney General) [hereinafter cited as *1975 House Hearings*]. Opponents of fair trade repeal made precisely the same points. *E.g., Id.* at 48-49 (testimony of Thomas Rothwell).

[16]The conference report states the "purpose" of the act: "Without the [Miller-Tydings and McGuire] exemptions the agreements they authorize would violate the antitrust laws." S. Rep. No. 466, 94th Cong., 1st Sess. 1, (1975). Repeal "will prohibit manufacturers from enforcing resale prices." *Id.* at 2. The House Report is as vivid: "An agreement between a manufacturer and a retailer that the retailer will not resell the manufactured product below a specified price is . . . per se illegal under section 1 of the Sherman Act . . ." H.R. Rep. No. 341, 94th Cong., 1st Sess. 2 (1975). After summarizing asserted justifications for fair trade and rejecting them, the report states that "the Committee concluded that a continued exemption . . . permitting resale price maintenance could not be justified." *Id.* at 5.

[17]*See* 121 Cong. Rec. 38,049-50 (1975) (Sen. Brooke: without the exemptions that the legislation would repeal, rpm would violate the Sherman Act); 121 Cong. Rec. 23,659 (Rep. Rodino: without the exemptions that the legislation would repeal, resale price maintenance agreements "would be *per se* violations of the antitrust laws"). *See also* 121 Cong. Rec.-House 23,600-661 (Reps. Hutchinson, McClory, Van Deerlin).

B. In Reinstating the Per Se Rule Congress Considered and Rejected the Free-Rider and Other Arguments Now Made in Support of Rpm.

Opponents of the 1975 legislation asserted the need for point-of-sale services in the marketing of goods and that rpm was the supplier's way of assuring that these would be provided.[18] The free-rider danger, so much stressed today, was rejected by Congress though presented with sophistication, vehemence and even poignancy.[19] Among the other rpm justifications urged on Congress were: protection for new entrants;[20] danger of "cut-throat competition";[21] quality lowered to meet a price;[22] danger of predatory pricing;[23] "loss leaders" destroying brand reputation;[24] big, low-overhead merchandisers driving out small dealers;[25] benefit to "store brands";[26] and promotion of greater interbrand competition.[27]

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[18]*E.g., 1975 House Hearings, supra* at 32 (citing Robert Bork), 159-66; *1975 Senate Hearings, supra* at 94-95, 97-99, 108-14, and 126-33.

[19]*Id.* at 110-11; *1975 House Hearings, supra* at 105, 179-81 (citing Phillip Areeda).

[20]*1975 House Hearings, supra* at 51, 55, 61-64; *1975 Senate Hearings* 76-77, 86-92.

[21]*1975 House Hearings, supra* at 29.

[22]*1975 House Hearings, supra* at 33, 36; *1975 Senate Hearings, supra* at 71, 78, 108.

[23]*1975 House Hearings, supra* at 40-41; *1975 Senate Hearings, supra* at 113-16.

[24]*1975 Senate Hearings, supra* at 85, 136.

[25]*1975 Senate Hearings, supra* at 76, 78, 84, 111, 118, 128.

[26]*1975 House Hearings, supra* at 32, 49, 73, 76; *1975 Senate Hearings, supra* at 82, 115.

[27]*1975 House Hearings, supra* at 24-25, 73-75; *1975 Senate Hearings supra* at 83, 118.

The House Report summarizes the Committee response. It finds no empirical support for the claim that rpm benefits small sellers. It notes that if such sellers charge more they also provide more convenience and service, thus giving buyers a choice. The Committee also rejected the appeal that manufacturers be free to use rpm to assure that retailers promote and/or enhance the image of the product; the Committee favored assuring customers the opportunity to choose between intangibles like extra service and lower price.[28]

C. Other Congressional Actions Show Support for the Per Se Rule.

In 1963 proponents of rpm sought federal "Quality and Price Stabilization" legislation that would protect rpm from the Sherman Act whether or not states authorized it. They argued that "price-cutting" endangers small retailers, makes market entry more difficult for new brands, threatens the reputation of established brands and may ultimately undermine product quality. Congress declined to act.[29]

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[28]H.R. Rep. No. 341, 94th Cong., 1st Sess. 4-5. Retailer organizations used to support rpm. Not so today. Indeed, the range of *amici* (from a major full service department store chain, to mail order houses) supporting Spray-Rite demonstrates this change of view.

[29]H.R. Rep. No. 566, 88th Cong., 1st Sess. 6-8 (1963), summarizes arguments to support the "Quality Stabilization" bill—the last serious effort to establish a federal fair trade law. They were unpersuasive; after exhaustive hearings (*Quality Stabilization, 1963, Hearings Before a Subcomm. of the House Interstate and Foreign Commerce Comm. on H.R. 3669 and Identical Bills*, 88th Cong., 1st Sess. (1963); *Quality Stabilization: Hearings Before a Subcomm. of the Senate Comm. on Commerce on S. 774*, 88th Cong., 1st Sess. (1963); *Quality and Price Stabilization, Hearings Before a Subcomm. of the House Interstate and Foreign Commerce Comm. on H.J. Res. 636*, 87th Cong., 2d Sess. (1962); *Quality Stabilization: Hearings on S.J. Res. 159 Before a Subcomm. of the Senate Comm.*

Congressional support for the *per se* rule was most recently expressed in connection with the Soft Drink Interbrand Competition Act.[30] The purpose of the act was to make sure that the *Sylvania* rule applied to vertical territorial restraints in the soft drink industry.[31] Witnesses pointed out, however, a risk that the bill might permit vertical price fixing.[32] The Committee added a new section[33] to make clear that such "traditional *per se* violations" would not be legalized.[34]

III

THE FREE-RIDER ARGUMENT FOR REVERSING DR. MILES OR LIMITING IT BY CONSTRUCTION IS UNCONVINCING.

Of the many contentions for rpm the favorite today is the "Chicago school" free-rider theory.[35] Its presupposi-

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on Commerce, 87th Cong., 2d Sess. (1962)) the Senate Committee voted not to report the bill out, while the House Committee kept it from reaching the floor of the House. *See* 111 Cong. Rec. 11,187 (1965) (statement of Rep. Gilligan). *H.R. Rep. No. 566,* 88th Cong., 1st Sess. 6-8 (1963).

[30] 15 U.S.C. §§ 3501-3503 (1982).

[31] S. Rep. No. 645, 96th Cong., 2d Sess. 1-11 (1980); H.R. Rep. No. 1118, 96th Cong., 2d Sess. 1-7 (1980).

[32] *Hearings on H.R. 3567 and H.R. 3673 Before the Subcomm. on Monopolies and Commercial Law of the House Judiciary Comm.,* 96th Cong., 1st & 2d Sess. at 183-84, 191, 354-55, 375 (1979-80).

[33] 15 U.S.C. § 3502 (1982).

[34] H.R. Rep. No. 1118, *supra* at 4, 6. See also 126 Cong. Rec. H. 5535-5536, H. 5541 (daily ed. June 24, 1980) (Rodino, Sieberling, Hall and Butler). See also Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitors' Complaints, supra* at n.39, where this legislative history is discussed more fully.

[35] The theory appears in a series of articles by Professor (now Judge) Bork: *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (II),* 75 Yale L.J. 373, 430-38 (1966); *A Reply to Professors Gould and Yamey,* 76 Yale L.J. 731 (1967); and *Resale Price Maintenance and Consumer Welfare,* 77 Yale L.J. 950 (1968). It is summarized in *The Antitrust Paradox* 32-33,

tions are severe and limiting; there must be: a competitive structure at both the supplier and dealer levels; no concerted action among suppliers or among dealers; and rational, profit-maximizing, fully-informed suppliers, dealers and consumers. From those hypothetical assumptions these conclusions are deduced: (1) Rpm will not limit competition among suppliers because a unilateral decision by one of a large number of competitors cannot affect competition. (2) Rpm will not restrict output or increase prices at the dealer level because using it to do that would be adverse to the interest of the rational, profit-maximizing supplier. (3) If a supplier decides to differentiate its product through dealer point-of-sale activities, dealers may refuse to comply unless rpm is used because of the danger of free-riders. (4) Because such a unilateral decision by a supplier will be subject to the competitive market, suppliers that differentiate this way are maximizing consumer welfare. This analysis has been rejected by Congress. For several reasons it should be rejected here as well.

A. The Free-Rider Argument Is Theoretically Unacceptable and Patently Inadequate as a Basis for Ignoring Settled Law and Clearly Expressed Congressional Intent.

In passing the Sherman Act, Congress had in mind several goals associated with a free market.[36] But even

288-98 (1978). The related theory of Professor (now Judge) Posner appears in *The Rule of Reason and the Economic Approach: Reflections on the* Sylvania *Decision*, 45 U. Chi. L. Rev. 1 (1977); *The Next Step in the Antitrust Treatment of Restricted Distribution: Per se Legality*, 48 U. Chi. L. Rev. 6 (1981).

[36] *Northern Pacific Railway Co. v. United States*, 361 U.S.1, 4-5 (1958); Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: the Efficiency Interpretation Challenged*, 34 Hast. L. J. 65 (1982).

limiting consideration to micro-theory and taking efficiency as the only goal, free-rider theory falls short. Well known micro-theorists, including distinguished Chicagoans, find it unacceptable. For example, Professor Ward S. Bowman, Jr. (with credentials as a rigorous micro-theorist of Chicago persuasion) takes quite a different view.[37] Using Chicago's rationality, perfect information and profit maximizing assumptions to argue against legalizing rpm, Bowman shows that resale prices: cannot be maintained unless the product enjoys some degree of monopoly power;[38] probably cannot be maintained without horizontal cooperation;[39] and will be a rational and effective device for a supplier only "where there is a substantial departure from competitive standards both on the producing or manufacturing level *and* on the reselling level. . . ."[40] In sum, rpm signifies the existence and exploitation of bilateral market power, shared by the supplier and dealers.

Thus, Chicago theory gives two alternative explanations for rpm: the Bork-Posner "market failure" explanation, and the Bowman "market power" explanation.[41] Though the Bork-Posner thesis has been better publicized to the judiciary, rigorous theoretical commentary strongly reinforces the Bowman view.[42] The centerist position is perhaps that

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[37]Bowman, *Resale Price Maintenance—A Monopoly Problem*, 25 J. of Bus. 141 (1952).

[38]*Id.* at 145.

[39]*Id.* 145 n.15.

[40]*Id.* at 148.

[41]Caves, *Vertical Restraints as Integration by Contract: Evidence and Policy Implications* (Harv. Inst. of Econ. Research, Discussion Paper No. 754, FTC, April 1980).

[42]Holahan, *A Theoretical Analysis of Resale Price Maintenance*, 21 J. of Econ. Theory 441 (1979).

discussed by Professor Caves.[43] Neither the shared power nor market failure explanation should be reified. Each suggests a possibility, a tendency, perhaps a partial truth. Even though supplier-dealer shared market power is involved in supplier-initiated rpm, the supplier may sometimes be acting to further differentiate its product. However, differentiation is not an unmixed good. It is a way to disaggregate markets—to make the demand curve steeper, to allow the supplier to price above the competitive level.[44] The Caves paper also emphasizes the vast array of devices other than rpm that are available to a supplier seeking to differentiate,[45] and shows that in many actual markets rpm, if used instead of less restrictive means, can severely injure competition.[46]

In their debate with Bork, Professors Gould and Yamey point out yet another crucial defect in free-rider theory.[47] They do not set themselves against Bork's analytical style but insist on pressing its deductive logic as far as it will go. Doing this, they show that when rpm is used by a supplier to differentiate its product and to alter and change consumer taste, there is no theoretical yardstick with which

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[43]Caves, *supra* n.41.

[44]Comanor, *Vertical Territorial and Customer Restrictions:* White Motor *and Its Aftermath*, 81 Harv. L. Rec. 1419 (1968).

[45]Caves, *supra* n.41.

[46]*Id.*

[47]Gould and Yamey, *Professor Bork on Vertical Price Fixing*, 76 Yale L. J. 722 (1967); Gould and Yamey, *Professor Bork on Vertical Price Fixing: A Rejoinder*, 77 Yale L. J. 936 (1968). The Bork articles, with which these papers take issue, are those cited in note 35. Professor Yamey also discusses rpm in Yamey, "Introduction: The Main Economic Issues" in Yamey (ed.), *Resale Price Maintenance* 3-21 (1966).

mirco-theorists can measure effects on consumer welfare.[48] When one turns to industrial organization economists (who trade off some of the "rigor" of Chicago theory for a closer touch with empirical reality), support for rpm virtually disappears.[49] As Low saw the matter in 1970, the economics profession is "overwhelmingly opposed to rpm. . . ."[50]

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[48]Micro-theory is static theory. Its ultimate guide to welfare is what consumers at a given time prefer. When suppliers make efforts—even wholly legitimate ones—to change consumers' tastes, there is no rational way to determine whether the end state is preferable to the beginning state; the yardstick has been altered along with the goods being measured. The Bork-Posner position thus depends on what is ultimately a wholly arbitrary identification between supplier profit-maximizing conduct and consumer welfare. It relies on "the proposition that promotional activities which are profitable to the entrepreneur necessarily improve the allocation of resources," a proposition that "has not, and indeed probably cannot, be derived from standard welfare economics." Since "Bork relies [as does Posner] on standard welfare economics" he "has not demonstrated the validity of his proposition." *Id.* at 77 Yale L. J. 938-39. This difficulty is amplified, of course, when suppliers attempt to change consumer preferences by convincing consumers that a branded product is significantly different from other products when in actuality it is substantially identical with them, or attempt in other ways to mislead consumers about product attributes.

[49]Major industrial organization and antitrust scholars have supported the *per se* ban on rpm. See, e.g., 3 Areeda & Turner, *Antitrust Law* § 828d (1978) (rpm "appropriately forbidden by Sherman Act § 1"); Kaysen & Turner, *Antitrust Policy: An Economic and Legal Analysis* 212-13 (1959); Asch, *Economic Theory and the Antitrust Dilemma* 382-84 (1970); Scherer, *Industrial Market Structure and Economic Performance* 469-93 (2d ed. 1980); Low, *Modern Economic Organization* 424 (1970). Corey, *Fair Trade Pricing: A Reappraisal* 30 No. 5 Harv. Bus. Rev. 47 (1952).

[50]Low, *Modern Economic Organization*, supra at 424. The evidence supports Low's conclusion. In 1963-64 six well known economists circulated the American Economic Association for signatures in opposition to H.R. 3669, the "Quality Stabilization Bill" that would have established a federal fair trade program. Of 1,200

B. The Realities of the Market Place Impeach the Free-Rider Theory.

Free-rider theory uses a supplier decision about supplier welfare as a surrogate for consumer welfare. To do that, the theory must not only assume rational, competitive markets and fully informed buyers and sellers at every level, it must also ignore the essential nature of the retail function and the observable characteristics of real retail markets. The theoretical claim is that informed, rational suppliers know better than do retailers the market-clearing profit-maximizing retail price that will yield the ideal mix of price, promotion and service at the retail level. But that implies that every retailer is just like every other—or ought to be; that there is one, "right" resale price for all.

The implied conception is that all value is added at the manufacturing level—that retailers do nothing but deliver the product (or if they do anything else, they all do the same thing in the same way). On those assumptions all "efficient" retailers will experience the same costs. It is the sum of these costs that must be covered by the manufacturer-imposed price. But the reality of retailing is vastly more varied and complex. Retailers, like others in the chain, add value, and do so in a variety of ways: through inventory, through location, through amenity and through providing information. Moreover, retailers vary greatly

economists solicited, 572 replied. 570 (including two former chairmen of the Counsel of Economic Advisers, 80 Deans, 102 department heads and at least 255 full professors) indicated opposition to the bill; one indicated support for it; one indicated no opinion. The bill would have done in substance what the government here urges the Court to do by overruling *Dr. Miles*. See Villard, *Opposition to the Quality Stabilization Bill*, 55 Am. Econ. Rev. 683 (1965). See also the testimony of Lawrence Shepard, *1975 House Hearings*, *supra* at 147 (economists "almost universally" regard rpm as an "impediment to competition").

both in style and location. There are significant differences in the amounts of value different retailers add, and, in consequence, large differences in the costs they experience.

Indeed, marked differences in convenience, and hence in costs, can exist even between two retailers performing identical functions but at different locations—say, two full service department stores, one in dowtown Washington and one in Seven Corners, Virginia or two boutiques, one in Georgetown, one in Seven Corners. These outlets will be offering very different locational utilities; if markets tell us anything, they tell us that a square foot of space in a prime location is worth more than a square foot elsewhere. Thus, two outlets offering essentially the same range of inventory, amenity and service in contrasting locations are, in the economic sense, offering different services. They experience different costs—often vastly different costs—which reflect the market's assessment of the differences in the value of the different services they provide. There is no credible reason to allow a supplier to interfere with such free-functioning retail markets by dictating a single resale price at which both must sell. It will be unfair to some, overly generous to others, and will inevitably reduce the variety and interests that characterize free, competitive markets.[51]

Differences in cost are magnified when retailers differ not only in location, but also in size, service, inventory and amenity.[52] Retailers may vary in the locational (and thus time) convenience they offer, in the range of merchandise

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[51]Scherer, *Industrial Market Structure and Economic Performance, supra* at 592.

[52]See,e.g. Davidson, Doody and Sweeney, *Retailing Management* Ch. 5 (4th ed. 1975).

available, in the kinds of information and person interaction they provide, and in atmosphere and style.[53] Retailing, then, is a service industry. Retailers do not merely "deliver" the products of their suppliers. Because they add value in these ways they use suppliers' products as an "input," much as an appliance manufacturer uses machine parts as an input. Different retailers combine a particular supplier's product with other elements to provide differentiated outputs, just as different appliance manufacturers differentiate their end product though some inputs are the same.

Contrasts between the neighborhood store and the full service department store, or between the back-street discounter and the full-service department store are familiar. On the face of the matter the per unit costs of one may be several times that of the other. These are but examples. Any urban scene shows a vast continuum in mixes of inventory size, convenience of location, style and amenity, and availability of informed help, service, credit and the like. That costs are as varied is inevitable.

To allow the supplier to mandate one price for all is unrealistic policy. Suppose the centralized decision calls for a price high enough to cover the costs of high-cost retailers. If so, it denies to all lower cost retailers (and to consumers they attract) the benefit of the lower cost marketing strategy these retailers have elected. Indeed, in the first instance, rpm literally foists supra-competitive profits upon low cost retailers. Without rpm each retailer can offer a mix of goods, services and conveniences that differs from those offered by others. One is close at hand, another well stocked and informed, the third cheap. Each is obliged

[53] *Id.* at 102-108.

by competition (with other like units and across these categories) to set prices commensurate with its own rent, inventory, personnel and other costs. Each attracts consumers that are content with its particular mix. Not only are products differentiated, but retailers are differentiated, and consumer choice expanded. There is no greater reason to allow the supplier of a product, an input to a retailer, to dictate the price of the retailer's product-location-service-amenity output, than there is to allow the supplier of a machine-part input to a manufacturer to dictate the price of the manufacturer's appliance output.[54]

Just as retailers differ—and experiment, develop and change over time—so, consumer demand changes with time. One of the most sensitive aspects of retailing is responding to, and seeking to anticipate, such changes through price and inventory adjustments.[55] Once again, it would be unrealistic to assume that these changes occur everywhere at the same time and rate, so that a centralized response, dictated by the supplier for all retailers, is appropriate. Quite the reverse is true. Centralized decision making by

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[54]Retailers are almost always multi-product outlets. Rent, salaries and overhead costs are common to all products they sell. Thus, retailers cannot price at marginal cost. If the goal is the most efficient price (as it is for Chicago theorists) retailers must spread common costs over all products sold inversely to the elasticity of demand for the products. Baumol and Bradford, *Optimal Departures from Marginal Cost Pricing*, 60 Am. Econ. Rev. 265 (1970). This being so, the efficient price of any product for any retailer will vary with the particular mix of products that the retailer sells. This is another real world variation that a centralized, supplier-mandated, pricing system cannot take into account.

[55]See Irvine, *An Optimal Middleman Firm Price Adjustment Policy: The "Short-Run Inventory-Based Policy,"* 19 Econ. Inquiry 245 (1981); Irvine, *Econometric Tests of the Hypothesis that Market-Maker Firms Follow a "Short-Run Inventory-Based Pricing Policy,"* 53 J. of Bus. 1 (1980).

the supplier is inevitably a blunter, less sensitive response mechanism than is the classical retail system where countless individual traders read and respond to the aspect of the ever changing market with which they individually interact. The classical system, moreover, will provide the supplier, too, with better data about what is happening over the market as a whole than could verbal reports from dealers to suppliers which some of the *amici* tout as appropriate.

The Bork-Posner assertion that supplier welfare is a surrogate for consumer welfare also ignores the dynamic functions of markets. Rpm prevents dealers from "pursuing a low-margin strategy."[56] To the extent that goal is achieved, it "frustrate[s] the adaptation of distribution channels to meaningful changes in consumer wants and . . . encourage[s] the perpetuation of obsolete, inefficient channels."[57] A distribution system with numerous dealers seeking to determine what consumers want, and experimenting with different mixes of point-of-sale service and price, will be a far more sensitive to consumer taste and more capable of dynamic response than would be a distribution system where all such decisions are made monolithically by the supplier.

In a recent study Robert L. Steiner demonstrates such dynamism historically. All of the mass merchandizing innovations—the department store, mail order house, chain store and discount store—entered the market with a different, rather than an inferior, package of goods, amenities, price and service.[58] Each of these innovations lowered

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[56]Scherer, *Industrial Market Structure and Economic Performance*, *supra* at 592.

[57]*Id.*

[58]R. L. Steiner, *Vertical Restraints and Economic Efficiency* 13-25 (Bureau of Economics, FTC, Working Paper No. 66, June, 1982).

price, reduced per unit costs, and gave consumers a wider range of choice. But every one of them could have been foreclosed if rpm had been successfully enforced against them. When this is recognized the claim of free-rider theorists that rpm does not restrain the competitive deployment of down-stream resources collapses. Retailing is a major segment of the economy.[59] It makes its own major contribution to the GNP. Variety, experimentation, and dynamic innovation are as important here as in any other segment of the economy.

When the supplier makes the price-service mix decision for all dealers, an over-investment in service is almost inevitable. All dealers will not be of the same size, nor experience the same population density, nor be equally efficient. Thus, the price the supplier sets will have to be high enough to cover the costs of the highest cost dealer that the supplier wants to keep in the market. Others, initially earning a supra-competitive return, may want to bid against each other for more customers. But not being able to bid by lowering price, they will tend to bid by increasing outlays for advertising and service. They will, in short, act just like airlines acted before deregulation.[60]

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[59]In 1981 retail trade equaled 8% of national income, a total of $197.5 billion, *Statistical Abstract of the United States*, 1982-83 at pp. 424, 800. Retailers employed almost 14 million people, about 15% of total employment (*id.* at 801), and incurred payroll of $90.534 billion (*id.* at 808).

[60]Free-rider theorists view retailers with higher costs than could be covered at the imposed price as "inefficient." But the high cost retailers may have been experiencing high costs because they were offering a product-price-service mix that some consumers highly valued and would, if given the option, have been glad to pay for. And the low cost outlet, being encouraged to spend on promotion rather than exploiting its low cost by price reductions, is being forced into the same inflationary, amenities-increasing spiral that

That is the remarkable irony in the Bork rpm analysis. Chicagoans, like other economists, vehemently oppose government price-control where competitive price determination is feasible.[61] As an analytical school they often respond to claims about "market failure" by finding the source of the problem in a bad rule of law or by saying, "Do not worry; the market will cure it in time."[62] But for rpm Bork reverses field. To deal with the relatively trivial free-rider market failure, he opts for centralized price-setting by suppliers—an interference with competitive pricing that can distort the free market much as price-setting by government.

The actual results that would flow from legalizing rpm are reasonably clear. Though the empirical evidence is episodic and impressionistic,[63] it indicates that rpm not only reduces dealer autonomy and consumer choice, but also leads to higher consumer prices. Contrary to the Bork-Posner thesis prices are likely to be substantially higher and output substantially lower under fair trade than in a free market.[64] Steiner reviewed theoretical and empirical material, and also turned to the marketing literature, a source close to the marketplace. He flatly rejects the notion that unless rpm is a dealer cartel it is welfare increasing.

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affected the airline industry before deregulation. See 2 A. Kahn, *The Economics of Regulation* 208-220 (1966); *CAB Practices and Procedures*, Report, Subcomm. on Adm. Prac. and Proc., S. Comm. on the Judiciary, 94th Cong., 1st Sess. 6 (1975).

[61]See, e.g., Stigler, *The Theory of Economic Regulation*, 2 Bell J. 3 (1971); Posner, *Theories of Economic Regulation*, 5 Bell J. 335 (1974).

[62]*Id.* See also Posner, *Economic Analysis of Law* 271 (2d ed. 1977).

[63]Frankel, *The Effects of Fair Trade: Fact and Fiction in the Statistical Findings*, 29 J. of Bus. 182 (1955).

[64]H.R. Rep. No. 341, 94th Cong., 1st Sess. 3 (1975); 121 Cong. Rec. Senate-20872 (daily ed. December 2, 1975); 1975 Senate Hearings 3-4, 11, 26-27, 51-52, 150-151, 174, 176, 216 and authorities

"Inclusion of realities . . . results in a considerably less benign assessment. . . ."[65] He concludes that rpm occurs mostly in industries, dominated by distributive trades, where consumers are poorly informed; in such industries restraints on intrabrand competition evolve whether or not any free-rider problem exists.[66] Consumer welfare is injured and supplier welfare may be also, since suppliers tend to continue such restraints long after they serve their interests.[67]

Another premise of free-rider theory is that low service outlets drive out high service outlets. But the marketplace

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there cited at 174 n.5. Relatedly, per store sales are lower where fair trade is in effect than when it is not. See ABA Antitrust Section, *Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition* 80 (1977). There are confirming studies of particular segments. E.g., W. A. Sandridge, *The Effects of Fair Trade on Retail Prices of Electrical Housewares in Washington, Baltimore and Richmond*, 1952-9 (Ph.D. Dissertation, Univ. of Va., 1960), cited in S.C. Hollander, "United States of America," in Yamey (ed.) *Resale Price Maintenance, supra* at 85 n.48 (1966); Bowman, *The Prerequisites and Effects of Resale Price Maintenance, supra* at 852-73 (one-half of tooth paste sales in non-fair trade states and one-third in fair trade states below suggested price); Hourihan and Markham, *The Effects of Fair Trade Repeal: The Case of Rhode Island* (1974); Pickering, *The Abolition of Resale Price Maintenance in Great Britain*, 26 Oxford Econ. Papers 120 (1975); Keoch, *The Abolition of Resale Price Maintenance: Some Notes on Canadian Experience*, 31 Economica 260 (1964). Most recently, after state liquor rpm laws were repealed following this Court's *Midcal* decision, retail prices fell about 20%. See New York Times, Sun., Jan .14, 1979, § XI, p. 1, c. 1; New York Times, Jan. 3, 1979, p. 1, c. 1.

[65]Steiner, *Vertical Restraints and Economic Efficiency, supra* at 2. See also Buchanan, "Resale Price Maintenance: An Historic Perspective" in *Sixteenth New England Antitrust Conference* at 356-416 (1982).

[66]*Id.* at 8-11.

[67]*Id.* at 12-13. This conclusion is confirmed by case studies. Sharon Oster, *The FTC v. Levi Strauss: An Analysis of the Economic Issues* (Consultant's Report to FTC, Rev. March 1982); McEachern and Romeo, *Audio Components Industry: An Economic Analysis of FTC Intervention* (Consultant's Report to FTC, 1981).

refutes this. Small, local stores with relatively high per-unit overhead do not go out of business because larger, more centrally located stores with lower per-unit costs sell for lower prices; the small, local stores provide convenience, service and amenity that the larger, centrally deployed units cannot match. Some consumers (having the choice) pay more to get what they value more. Even in central cities high amenity, high-rent, full service department stores with displays, informed sales help, and service facilities consistently thrive within blocks of discount houses offering less amenity, less information, less service and lower prices. Some consumers prefer the amenity and reliability of a Macy's. Others will pay even more for an "exclusive" or "boutique" atmosphere. But others will shop price if rpm does not foreclose. Rpm supporters overestimate the free-rider problem because they underestimate the variety and complexity of consumer interests, the innovativeness and responsiveness of retail entrepreneurs, and the resilience of free, competitive markets. The antitrust laws do not. They protect dealer autonomy and consumer choice.[68]

C. While Doubt Exists Whether Rpm is Used to Avoid Free-Riders, There Is Virtually Universal Agreement That Rpm Can Be and Is Used to Cartelize.

Theorists, including Bork and Posner, regard rpm as a useful device for cartelization.[69] Indeed, the classic support for rpm has been from organizations concerned

[68]Kaysen & Turner, *Antitrust Policy*, *supra* at 11-22; Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 Cornell L. Rev. 1140 (1981); Pitofsky, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979).

[69]The Bork and Posner views appear in the works cited in note 35 *supra*. For the views of other theorists see, e.g., the works cited in notes 41, 47 and 49.

about maintaining margins.[70] Where consumer information problems are significant a supplier may have little resistance to dealers urging the use of rpm. Nor need dealer cartelization be explicit. In some markets, retailers as a class have market power because most consumers lack relevant information, think retailers have it, and are ready to accept retailer guidance. To induce such retailers to favor its brand, a manufacturer may establish rpm. The social consequence is so close, as a practical matter, to dealer cartelization that to forbid the one and allow the other would be indefensible.

Moreover, rpm can facilitate supplier cartelization, interdependent pricing or price signaling. Concerted pricing is a risk in an oligopolistic industry. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). But just as producers have an incentive to cooperate each, individually, has an incentive to "cheat" by pricing competitively. Rpm, if used by several producers, makes cheating easier to detect, thus reinforcing industry-oriented (cooperative) rather than firm-oriented (competitive) pricing.[71]

D. Rpm Can Be and Is Used to Exploit Information Deficiencies to Facilitate Price Discrimination.

Free-rider theory concedes that there are gaps in consumer information, but assumes that suppliers will provide accurate information in response. Not always. A supplier may act strategically. It may take advantage of consumer

[70] Fulda, *Resale Price Maintenance*, 21 U. Chi. L. Rev. 175 (1954); *Report on Quality Stabilization Bill*, H.R. No. 566, 88th Cong., 1st Sess. (1963).

[71] 3 Areeda & Turner, *Antitrust Law* § 828d (1978) (one objection to rpm is that oligopolistic manufacturers may use it to facilitate parallel pricing).

information gaps and use rpm to price discriminate (knowledgeable consumers getting the lower price, uninformed ones paying the higher). Such a supplier markets its product under two brand names. Rpm is used for the "prestige" brand, which is advertised widely. This signals dealers that high mark ups will be maintained and encourages them to "guide" consumers seeking product information to this product. The unadvertised brand—identical, or nearly so—is available for the knowledgeable consumer who can judge the price-quality relationships for himself (as well as for the consumer that shops for the lowest price, regardless of possible quality differences). In sum, if suppliers and dealers are always rational profit maximizers (as Chicago theory assumes they are) making rpm available to them is likely to injure consumers whenever information deficiencies make strategic exploitation feasible.[72]

E. Any Legitimate Goal Sought by a Supplier Can Be Achieved by Less Restrictive Means Than Rpm.

Usually, a supplier can obtain the point-of-sale activity it wants by judicious choice of the retailers to which it sells.[73] When a supplier—for example, a new entrant seeking to attract dealers or a supplier hoping to mandate highly specific and expensive point-of-sale activities and worried about free-riders—wants to influence downstream

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[72]See generally R. L. Steiner, *Vertical Restraints and Economic Efficiency, supra.*

[73]Differing styles of retailing are reflected in differing investments at the retail level. Styles, moreover, are "built into": the real estate (both location and facilities); the inventory capacity and control system; the management background, training and experience; the personnel patterns; and the store's reputation and good will. When a supplier decides to sell to a particular dealer the supplier has ample information about how the product will be handled and can be confident that the particular style and point-of-sale promotion used by the retailer will not radically or rapidly change.

activities more directly, there are more effective, less restrictive, means than rpm. These include the customer, territory and location restraints authorized by *Sylvania*, primary responsibility or pass-through clauses, direct payments to dealers for services, cooperative advertising, warranty compensation arrangements, and other arrangements as varied and fine-cutting as the genius of the marketing manager can devise.[74]

Indeed, rpm is not well suited to deterring the free-rider. If a supplier imposes and enforces resale territory or location restraints the free-rider is effectively foreclosed. Point-of-sale promotion has effects only within a limited geographical area; if that area is reserved to the promoting dealer, he gets the full benefit. But if another dealer is in the same area, to forbid price cutting does not preclude the second dealer from sharing the benefits of promotion by the first. Territorial protection can help to "internalize" promotion. Rpm cannot. But if rpm is in effect, the market's "central nervous system"[75] will not be able to reflect differences in dealer offerings.

IV

TO HOLD THAT COMPLAINTS FROM DEALERS FOLLOWED BY TERMINATION FOR PRICE CUTTING, IS "UNILATERAL CONDUCT" AS A MATTER OF LAW WOULD BE TO REDUCE DR. MILES TO AN EASILY EVADED TECHNICALITY.

Where two or more dealers complain of price cutting by another and the supplier, in response, imposes discipline,

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[74] See generally Caves, *Vertical Restraints as Integration By Contract: Evidence and Policy Implications*, *supra*.

[75] *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940).

there is "concerted action" in a literal sense. Petitioner here cannot challenge the sufficiency of the evidence to show such a literal conspiracy. It rather contends that when a supplier polices resale prices through dealer complaints the concert involved should be called "unilateral" unless the supplier's reasons for wanting to inhibit price competition are the same as those of dealers. But a *Dr. Miles* conspiracy need not entail vertically related parties all acting from the same motive. Indeed, in *Dr. Miles* itself, the supplier had its own independent reasons for wanting rpm—to protect product good will against confusion, essentially the same reason petitioner asserts here.

The argument by petitioner's *amici* that the need for "communication" between supplier and dealers makes it necessary to modify *Dr. Miles* is equally unconvincing. *Amici* assert that dealers are the best source of information about what resale prices ought to be. They infer that suppliers that set prices should, therefore, be able to talk about prices with dealers. This argument proves too much. Dealers *are* the best evaluators of retail prices. But this is why they should be setting prices themselves, not reporting and discussing prices with suppliers. Other like arguments are equally weak. Consider, for example, the claim that if a dealer shades "suggested" prices it can be inferred that it is also likely to be violating other (legal) resale restraints. The inference is presumably based on the assumption that all dealer costs are identical, and that price shading must therefore signify cutting the costs of point-of-sale services the supplier seeks to encourage. But as shown above, retailer costs can vary within a wide range and for a variety of reasons. The fact that all dealers are engaging in mandated point-of-sale activities will reduce cost differ-

ences, perhaps, but will hardly eliminate them. In any event *Sylvania* restrictions, (and other lawful resale restrictions) are not supposed to serve as *sub rosa* means of maintaining resale prices.

Nor is the existing *per se* rule confusing. Suppliers that want to avoid a *Dr. Miles* violation may do so readily enough. If they use a *Colgate* "suggested price" system, they must not police it through a dealer caucus. They must maintain "Doric" simplicity.[76] If they impose *Sylvania* restraints, they must enforce these consistently.

To label "unilateral" conduct that is literally concerted and often coercive in order to facilitate supplier control of down-stream prices would be to reduce *Dr. Miles* to a trap for the inept.[77] Any supplier, competently advised, would be able to establish and maintain an rpm system. There is simply no justification for such diminishment of *Dr. Miles*. Suppliers can attain all legitimate goals without rpm. Rpm denies retailers freedom to price in a manner commensurate with the costs of their particular product-service-amenity mix. Rpm reduces consumer alternatives and may be used to exploit consumers. It ought not to be accomodated either directly, or by convoluted construction.

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[76] *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F. 2d 787, 790 (2d Cir. 1960).

[77] It is significant that when Congress repealed the Miller-Tydings and McGuire Acts in 1975, it acted with recognition and approval of the fact that "[s]ubsequent cases have limited *Colgate* strictly to its own facts, finding a Sherman Act violation in the slightest hint of concerned activity. . . ." *1975 House Hearings, supra* at 2 n.1.

CONCLUSION

For all of the above reasons, this Court should refuse to legalize rpm either by overruling *Dr. Miles* or by adopting constructions of "unilateral" and "contract, combination or conspiracy" which would, as a practical matter, enable suppliers to evade *Dr. Miles*.

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No. 82-914

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1982

MONSANTO COMPANY
Petitioner,

v.

SPRAY-RITE SERVICE CORPORATION
Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For the Seventh Circuit

BRIEF FOR FORTY-SIX STATES AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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The States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota; Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, the Commonwealths of Kentucky, Massachusetts and Pennsylvania, and the District of Columbia (hereinafter the "Amici States") submit this brief in support of Respondent Spray-Rite Service Corporation.

II
IDENTITY AND INTEREST OF THE AMICI STATES

A. Identity Of Amici States

The Attorneys General of the Amici States are the chief law enforcement officers of their respective states. As such, they are charged by law with responsibility for the enforcement of their respective states' antitrust laws, and of the federal antitrust laws.[1] In addition, the Attorneys General represent their respective states and political subdivisions in treble-damage actions under the federal antitrust laws, and are authorized by law to bring such actions as _parens patriae_ on behalf of their natural citizens.[2] The Corporation Counsel for the District of Columbia has the same duties and authority with

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1 Pennsylvania does not have a state antitrust law. It does, however, play a major role in the enforcement of the federal antitrust laws.

2 15 U.S.C. 4C

respect to the District of Columbia.

B. <u>Interest Of The Amici States In This Case</u>

Because of their major role in the enforcement of the antitrust laws, the Amici States have a substantial interest in the application of those laws in a manner consistent with the underlying Congressional policy and with this Court's numerous pronouncements with respect thereto.

Moreover, the states' antitrust laws are generally construed in accordance with federal court decisions interpreting corresponding provisions of the federal laws.[3]

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3 <u>See</u>, <u>e.g.</u>, <u>People v. North Avenue Furniture & Appliance</u>, 645 P.2d 1291 (Colo 1982); <u>Neyens v. Roth</u>, 326 N.W.2d 294 (Iowa 1982); <u>Grams v. Boss</u>, 97 Wisc.2d 332, 294 N.W.2d 473 (Wisc. 1980); <u>Marin County Bd. of Realtors v. Palsson</u>, 130 Cal.Rptr. 1, 549 P.2d 833 (Calif. 1976); <u>State v. Readers Digest Assoc.</u>, 81 Wn.2d 259, 501 P.2d 290 (1972); <u>Pittsburg Plate Glass Co. v. Paine & Nixon Co.</u>, 234 N.W. 453 (Minn. 1931).

For these reasons the Amici States oppose the contentions of Monsanto and the United States that resale price maintenance schemes should not be treated as per se violations. These contentions are antithetical to the Amici States' interest in sound antitrust policy and effective enforcement of the antitrust laws, and are inimical to pending cases and investigations involving resale price maintenance schemes.

III
SUMMARY OF ARGUMENT

1. The economic theories now advanced as justifications for abandoning the per se treatment of resale price maintenance schemes do not remotely justify such action. The competitive dangers presented by resale price maintenance far outweigh the theoretical justifications and assumptions relied upon by Monsanto and the United States, many of which have already been rejected by the Court. The dangers are many. Resale price maintenance facilitates horizontal price fixing, at both the manufacturer level and at subsequent levels in the chain of distribution. It results in higher prices, protects inefficiency and misallocates resources. It limits the free exercise of business judgment by independent distributors and dealers, and inhibits their ability to respond to the immediate competitive

demands of their markets. It also eliminates the choice of consumers as to the price premiums they are willing to pay for dealer services, while at the same time providing no guarantee that the services presumed to follow from resale price maintenance will indeed materialize.[4] In addition, there are numerous alternatives unrelated to price now available to manufacturers as a means of addressing the marketing objectives allegedly enhanced by resale price maintenance.[5]

Moreover, it is apparent from the legislative history of the Sherman Act and the Court's decisions thereunder that the consistent application of the per se rule to resale price maintenance has not been mechanical and unthinking. Rather, it reflects due regard for the broad range of policy considerations--the

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4 See infra pp. 44-53.
5 See infra pp. 53-56.

social and political as well as the economic--underlying the Sherman Act's fundamental democratic purpose of preserving economic opportunities and unfettered competition in all sectors of the economy at all levels of distribution.[6]

For similar reasons, the Court has consistently rejected proffered justifications for price fixing based on alleged pro-competitive effects and economic theory. This refusal to "ramble through the fields of economic theory" serves well the underlying enforcement purposes of the Act, and reflects the Court's awareness of the virtual futility of undertaking an exhaustive analysis of economic theories and assumptions which are not capable of objective and meaningful measurement, and which ultimately require a choice between rival theories.[7]

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6 See infra pp. 9-31.
7 See infra pp. 31-44.

2. Even a record as sparse as that hypothesized by Monsanto could, in the context of a dealer termination case based on a claim of collusive resale price maintenance, justify a jury's inference of conspiracy. The absence of certain evidence in such a case could itself justify such an inference.[8]

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8 See infra pp. 58-65.

IV
ARGUMENT:
THE AMALGAM OF POLICY CONSIDERATIONS UNDERLYING THE SHERMAN ACT--THE SOCIAL AND POLITICAL AS WELL AS THE ECONOMIC--MANDATE CONTINUED APPLICATION OF THE PER SE RULE TO RESALE PRICE MAINTENANCE

A. The Conclusive Presumption Of Illegality Applied To Inherently Anticompetitive Acts And Practices--The Per Se Rule--Was Articulated By This Court Seventy Years Ago. The Rule Has Since Been Regularly And Consistently Applied By The Court To Such Conduct.

1. Origin Of The Per Se Rule

The per se rule is simply a conclusive presumption of illegality under §1 of the Sherman Act. The doctrine was first articulated by this Court in Standard Oil Co. v. United States, 221 U.S. 1 (1911). Referring to the Court's earlier decisions in United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897), and United States v. Joint-Traffic Association, 171 U.S. 505 (1898), Justice White held that the decisions in those cases

> [w]hen rightfully appreciated, were therefore this, and nothing more: That as considering the contracts and agreements, their necessary effect, and the character of the parties by whom they were made, they were clearly restraints of trade within the purview of the statute ... That is to say, the cases but decided that the nature and character of the contracts [created] a conclusive presumption which brought them within the statute ... .
>
> 221 U.S. at 65.

Similar language was employed sixty years later when Justice Marshall, speaking for the Court in <u>United States v. Topco Associates</u>, 405 U.S. 596 (1972), quoted from Justice Black's decision in <u>Northern Pacific Railway Co. v. United States</u>, 356 U.S. 1, 5 (1958), to explain the per se doctrine:

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal... .

405 U.S. at 607.

See also Arizona v. Maricopa County Medical Society, __U.S.__, 73 L.Ed. 2d 48, 59 (1982); Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646 n. 9 (1980); and Broadcast Music, Inc. v. C.B.S., 441 U.S. 1, 8 (1979).

The presumption that certain acts and practices have a pernicious effect on competition and lack any redeeming virtue--i.e., are illegal per se--reflects the Court's conclusion that as a result of their inherent nature or necessary effect, Thomsen v. Cayser, 243 U.S. 66, 84-85 (1917), Nash v. United States, 229 U.S. 373, 376 (1913), United States v. American Tobacco Co., 221 U.S. 106, 179 (1911), or because of their evident purpose, American Tobacco, 221 U.S. at 179, they are plainly anticompetitive, Broadcast Music, 441 U.S. at 8, National Society of Professional Engineers v. United States,

435 U.S. 679, 692 (1970), and invariably operate to the prejudice of the public interest by unduly restraining competition, Nash v. United States, 229 U.S. at 376, American Tobacco, 221 U.S. at 179.[9]

Since first announced in the seminal Standard Oil decision, the conclusive presumption of the per se rule has been steadfastly adhered to and frequently reiterated, most recently in Maricopa County, 73 L.Ed.2d at 59. See also, e.g., Broadcast Music, 441 U.S. at 8; and Topco Associates, 405 U.S. at 607.

9 See also Maricopa County, 73 L.Ed.2d at 58 and 59; Albrecht v. The Herald Co., 390 U.S. 145, 154 (concurring opinion of Justice Douglas, referring to "conspicuously unreasonable" conduct); United States v. Sealy, 388 U.S. 350, 355 (1967); and Simpson v. Union Oil Co., 377 U.S. 13, 21 (1964) (referring to certain acts' "inexorable potentiality for and even certainty in destroying competition").

2. The Per Se Rule Applies To All Forms Of Price Fixing, Including Resale Price Maintenance.

The polestar of the antitrust laws is that price fixing, in whatever form, is a per se violation of the Sherman Act. On no antitrust subject has the Court spoken with greater frequency and resolve. In 1940, Justice Douglas, speaking for the Court in United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), stated:

> Thus for over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act ... .

310 U.S. at 218.

Forty-two years later, after discussing the Court's price fixing decisions over the preceding eighty-four year period,[10] Justice Stevens stated

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10 Catalano, 446 U.S. 643; Topco Associates, 405 U.S. 596; Albrecht v. The Herald, 390 U.S. 145; Northern Pacific Railway, 356 U.[illegible]; Kiefer-Stewart v. Seagram, 34[illegible] S. 211 (1950); Socony-Vacuum, 310 U.S. 150; United States

for the Court in Maricopa County that "[w]e have not wavered in our enforcement of the per se rule against price fixing." 73 L.Ed.2d at 61.

The per se rule has historically proscribed resale price maintenance as well as other forms of price manipulation. Indeed, resale price maintenance was specifically characterized as violative behavior from the very inception of the Sherman Act itself. During consideration of the bill by the House Of Representatives, Representative Culberson of the House Committee On The Judiciary reported the act favorably from the Committee, and in doing so, identified resale price maintenance as an activity that would violate the act. 21 Cong. Rec., 51st. Cong., 1st. Sess., 4089 (1890);

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v. Trenton Potteries Co., 273 U.S. 392 (1927); Standard Oil, 221 U.S. 1; and Joint-Traffic Association, 171 U.S. 505.

Walker, History Of The Sherman Act, pp. 35-36 (1910).[11]

Acting on the Congressional mandate, this Court, from its earliest decision on the subject, Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911), to its most recent discussion thereof, Rice v. Norman Williams Co., __U.S.__, 73 L.Ed.2d 1042 (1982), has regularly and consistently condemned resale price maintenance agreements as per se violations of the Sherman Act. By 1956, Chief Justice Warren, speaking of the price maintenance conduct in United States v. McKesson & Robbins, 351 U.S. 305 (1965), was able to state that:

> It has been held too often to require elaboration now that

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11 See also 21 Cong. Rec., 51st. Cong., 1st. Sess., 4098 (1890) (remarks of Representative Taylor: "... if the conscience of the retailer is touched and he reduces his price the trust steps on him and refuses to sell to him or undersells him till he is ruined").

> price fixing is contrary to the policy of competition underlying the Sherman Act....

351 U.S. at 309-310.

In Albrecht v. The Herald, Justice White, citing the Court's previous decisions in Trenton Potteries, Socony-Vacuum, Kiefer-Stewart, and McKesson & Robbins, referred to "the long-accepted rule in §1 cases that resale price fixing is a per se violation of the law whether done by agreement or combination." 390 U.S. at 151-152. The Court's steadfast condemnation of such schemes was reiterated by Justice Powell in California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97 (1980):

> The Court has ruled consistently that resale price maintenance illegally restrains trade. In Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 407, 55 L.Ed. 502, 31 S.Ct. 376 (1911), the Court observed that such arrangements are 'designed to maintain prices ... , and to

prevent competition among those who trade in [competing goods].' See Albrecht v. The Herald Co. 390 U.S. 145, 19 L.Ed.2d 998, 88 S.Ct. 869 (1968); United States v. Park, Davis & Co. 362 U.S. 29, 4 L.Ed.2d 505, 80 S.Ct. 503 (1960); United States v. A. Schrader's Son, Inc. 252 U.S. 85, 64 L.Ed. 471, 40 S.Ct. 251 (1920).

. . .

As Mr. Justice Hughes pointed out in Dr. Miles, such vertical control destroys horizontal competition as effectively as if wholesalers 'formed a combination and endeavored to establish the same restrictions ... by agreement with each other.'

445 U.S. at 102-103.[12]

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12 See also Norman Williams, 73 L.Ed.2d at 1050 (Justice Rehnquist describing resale price maintenance as "an activity that has long been regarded as a per se violation"); Sealy, 388 U.S. at 355 ([resale price maintenance schemes'] anticompetitive nature and effect are so apparent and so serious that the courts will not pause to assess them in light of the rule of reason"); Simpson, 377 U.S. at 17; United States v. Bausch & Lomb Optical Co., 321 U.S. 707, 720 (1944); Ethyl Gasoline Corp. v. United States, 309 U.S. 436, 458 (1940) ("agreements for price maintenance ... are, without more, unreasonable

Monsanto's reliance upon Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), is unavailing. The Court expressly removed price-related vertical restrictions, i.e. resale price maintenance, from the scope of that decision:

> As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. ... [U]nlike nonprice restrictions, '[r]esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much

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restraints within the meaning of the Sherman Act because they eliminate competition ... "); Federal Trade Commission v. Beech-Nut Packing Co., 257 U.S. 441, 454 (1922) (price maintenance "necessarily constitutes a scheme which restrains the natural flow of commerce and the freedom of competition ... "). Cf., United States v. Colgate & Co., 250 U.S. 300 (1919).

between that product and competing brands.'

433 U.S. at 51, note 18.

Congress recently expressed its approval of the per se treatment of price maintenance schemes by enacting the Consumer Goods Pricing Act of 1975, [13] which repealed the Miller-Tydings and McGuire Acts under which resale price maintenance had previously been allowed at the option of individual states through the enactment of state fair trade laws. See California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 102-103 (1980); and Continental TV. Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51 n. 18 (1977). The legislative history of the Consumer Goods Pricing Act is replete with references to the per se rule and the Court's application of the rule to price maintenance cases.[14]

13 P.L. 94-145, 89 Stat. 801, amending 15 U.S.C.§ §1, 45 (a).

For a resale price program to avoid per se condemnation, the narrow path marked by Colgate and its progeny[15] is clear. If a manufacturer or distributor, for its own business reasons and through the exercise of its independent business discretion, unilaterally adopts and implements a program of suggested resale prices, it may do so. It can announce in advance of any sales to subsequent sellers its policy of selling only to

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14 See, e.g., Fair Trade, Hearings Before The Subcommittee On Monopolies And Commercial Law Of The Committee On The Judiciary, House Of Representatives, 94th Cong., 1st. Sess. (1975) (remarks of Representative Peter J. Rodino Jr., Chairman Of The House Judiciary Committee, at p.1: "[a]greements ... to maintain prices are classic restraints of trade. They have long been considered per se illegal under our antitrust laws."). See also H. Rep. No. 94-341, 94th Cong., 1st Sess. 2 (1975) (reporting that price maintenance agreements are per se illegal under the Sherman Act).

15 See Parke, Davis, 362 U.S. at 43-45; Bausch & Lomb, 321 U.S. at 721 and 723; Beech-Nut Packing Co., 257 U.S. at 452-453; A. Schrader's Son, 252 U.S. at 99; and Colgate, 250 U.S. at 306-307.

those who resell at the suggested prices, and it can unilaterally refuse to make further sales to resellers who, for their own independent reasons, choose not to follow the suggested price. The key to the legitimacy of any suggested resale price program is the absolute preservation of resellers' freedom to conduct at all times their business, in their market and subject to their competitive conditions, in whatever manner they deem appropriate, including the freedom to sell at, below, or above the suggested resale prices. Any arrangement which impairs this choice of action is beyond the pale. An agreement, whether express, implied from a course of dealing or other circumstances, or imposed through coercion or intimidation, which undertakes to secure adherence to suggested prices violates the act.

3. <u>The Per Se Rule Reflects Fundamental Social And Political, As Well As Economic, Considerations</u>.

Speaking for the Court in <u>Northern Pacific Railway</u>, Justice Black described the spirit and purpose of the Sherman Act as follows:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.
>
> 356 U.S. at 4.

This melding of social, political and economic concerns was similarly described by Justice Marshall in <u>Topco Associates</u>:

> Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill Of Rights is to the

> protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete--to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.
>
> 405 U.S. at 610.

These democratic tenets of the Sherman Act are reflected in its legislative history. In the words of Senator Sherman, "[i]t is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges." 21 Cong. Rec., 51st. Cong., 1st Sess., 2457 (1890). The Senator also remarked that:

> This bill is only an honest effort to declare a rule of action ... Although this body is always conservative, yet, whatever may be said of it, it has always been ready to preserve, not only popular

> rights in their broad sense, but the rights of individuals as against associated and corporate wealth and power.

Id. at 2460.

The Court has been vigilant in preserving these liberties. It has steadfastly condemned conduct which inhibits access to or the freedom of discretion within channels of commerce. The Court's regard for the democratic precepts underlying the Act are reflected in Justice Peckham's concern for the displacement of small businesses in Trans-Missouri Freight Association:

> [T]he result in any event is unfortunate for the country by depriving it of the services of a large number of small but independent dealers who were familiar with the business and who had spent their lives in it, and who supported themselves and their families from the small profits realized therein. Whether they be able to find other avenues to earn their livelihood is not so material, because it is not for the real prosperity of any country that such changes should occur which result in transferring an independent

> business man, the head of his establishment, small though it might be, into a mere servant or agent of a corporation and bound to obey orders issued by others.
>
> 166 U.S. at 324.

The specific liberty threatened has frequently been the ability to establish unilaterally the prices at which one will sell a commodity or service. Thus, for example, Justice Black, in striking down the price maintenance program in Kiefer-Stewart, stated that such programs "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." 340 U.S. at 213. Similarly, the Court concluded that the price maintenance scheme at issue in Simpson v. Union Oil violated the Sherman Act by "depriving independent dealers of the exercise of free judgment whether ... to sell at competitive prices." 377 U.S. at 16. Writing for the Court, Justice Douglas

observed that:

> Dealers, like Simpson, are independent businessmen ... . Practically the only power they have to be wholly independent businessmen, whose service depends on their own initiative and enterprise, is taken from them by the proviso that they must sell their gasoline at prices fixed by Union Oil.
>
> 377 U.S. at 20.

Justice White wrote in Albrecht v. The Herald that:

> [S]chemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition ... is not cast in a single mold.
>
> 390 U.S. at 152.

See also Maricopa County, 73 L.Ed.2d at 60-61; and Topco Associates, 405 U.S. at 610-611.

It is evident from the legislative history of the Sherman Act and the case law construing it that the underlying emphasis upon social and political, as

well as economic concerns reflects both an appreciation of human nature and human aspirations and the fundamental democratic purpose of the Act--the protection of commercial institutions, large or small, in any sector of our economy, from the potential abuse of economic power in whatever form. The very acquisition of such power, in and of itself--whether actually abused or merely reposing in a benign or dormant state--is the evil at which the Sherman Act strikes.

Speaking for the Court in Trenton Potteries, Justice Stone addressed the potential abuse of power as follows:

> The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices ... . Agreements which create such potential power may well be held in themselves unreasonable or unlawful restraints ... .

273 U.S. at 397.

Justice Stone subsequently addressed

the same subject in <u>Ethyl Gasoline</u>. With reference to Ethyl's accumulation of "vast potential power" "capable of use" as a means of controlling distributors' prices, 309 U.S. at 452-453 and 457, he wrote:

> Agreements for price maintenance ... are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition, . . . and agreements which create potential power for such price maintenance exhibited by its actual execution for that purpose are in themselves unlawful restraints within the meaning of the Sherman Act, which is not only a prohibition against the infliction of a particular type of public injury but a 'limitation of rights which may be pushed to evil consequences and therefore restrained.' <u>Standard Sanitary Mfg. Co. v. United States</u>, ... 226 U.S. 49 [1912] ... .
>
> 309 U.S. at 458.

Concern over the potential abuse of economic power was most recently reiterated by Justice Stevens in <u>Maricopa County</u>:

> [Respondents' reliance upon pro-competitive justifications] indicates a misunderstanding of the per se concept. The anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation ... .

73 L.Ed.2d at 63.[16]

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16 See also, e.g., Socony-Vacuum, 310 U.S. at 221 ("[T]hose who control the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy and drastically impair the competitive system."), 224 ("price-fixing agreements may have utility to members of the group though the power possessed or exerted falls short of domination and control"), and 224 n. 59 ("[price-fixing agreements] are all banned because of their actual or potential threat to the central nervous system of the economy"); Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 237 (1899) ("the most cogent evidence that they had this power ... ") and 238 ("its tendency was certainly to give the defendants the power to charge unreasonable prices, had they chosen to do so"); and Trans-Missouri Freight Association, 166 U.S. at 324 ("[i]n this light, it is not material that the price of an article may be lower. It is the power of the combination to raise it ... . ").

The need to curb such power because of its potential for abuse and its inevitable anticompetitive tendency was evident from common law experience long antedating the Sherman Act, 21 Cong. Rec. 2456 and 2457 (1890), National Society of Professional Engineers, 435 U.S. at 688, and was frequently referred to in the remarks of Senator Sherman when the bill was presented, 21 Cong. Rec. 2456-2459 (1890).

B. Due To The Inevitably Anticompetitive Effect Of Price Fixing Schemes, This Court Has Regularly And Consistently Rejected Justifications Based On Pro-Competitive And Economic Arguments

1. Throughout The History Of The Per Se Rule, Justifications Based On Alleged Pro-Competitive Effects And Economic Arguments Have Been Interposed As Defenses For Price Fixing Activities. The Justifications Have Been Routinely Rejected.

In recognition of the inherently anticompetitive effect of price fixing schemes, and the crucial, all-sensitive

role price plays in the competitive system mandated by the Sherman Act,[17] this Court has historically rejected proffered justifications based on pro-competitive arguments and economic abstractions, hypotheses and conjecture. Such attempts at justification have been numerous, including the promotion of competition;[18] elimination of the evils of "ruinous" competition;[19] that the prices fixed are fair and reasonable;[20]

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17 Price is "the central nervous system of the economy." Broadcast Music, Inc. v. C.B.S., 441 U.S. 1, 23 (1979); National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n. 59 (1940).

18 Topco Associates, 405 U.S. at 610.

19 Maricopa County, 73 L.Ed.2d at 62; Socony-Vacuum, 310 U.S. at 220; Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20, 42 (1912); Addyston Pipe, 175 U.S. at 235; Joint-Traffic Association, 171 U.S. at 576; Trans-Missouri Freight Association, 166 U.S. at 321.

20 Maricopa County, 73 L.Ed.2d at 59 and 62; McKesson-Robbins, 351 U.S. at 309-310; Trenton Potteries, 273 U.S. at 397-398; American Column & Lumber Co. v. United

that the unique competitive environment of a particular trade, profession or industry requires liberal treatment under the law,[21] or that a given level in the chain of distribution requires such treatment;[22] that the latest and best economic theories justify the restraint;[23] and that the parties intentions or motives were good.[24] All have been rejected.

States, 257 U.S. 377, 409-410 (1921); Trans-Missouri Freight Association, 166 U.S. at 331 and 341.

21 Maricopa County, 73 L.Ed.2d at 62; National Society of Professional Engineers, 435 U.S. at 689; Socony-Vacuum, 310 U.S. at 222 and 329-330.

22 American Column & Lumber, 257 U.S. at 400-401; Eastern States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600, 613 (1914).

23 Trenton Potteries, 273 U.S. at 397; Trans-Missouri Freight Association, 166 U.S. at 321.

24 Topco Associates, 405 U.S. at 610; McKesson & Robbins, 351 U.S. at 310; Thomsen v. Cayser, 243 U.S. at 85; Standard Sanitary Mfg. Co., 226 U.S. at 49; and Trans-Missouri Freight Association, 166 U.S. at 341.

Describing these proffered justifications as "typical of the protestations usually made in price-fixing cases," Justice Douglas stated in <u>Socony-Vacuum</u>:

> [F]or over forty years this Court has consistently and without deviation adhered to the principle that price-fixing agreements are unlawful per se under the Sherman Act and that no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense.
>
> 310 U.S. at 218.

The court subsequently reiterated this principle in <u>Topco Associates</u>:

> [T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.
>
> 405 U.S. at 610.

<u>See also</u> <u>McKesson & Robbins</u>, 351 U.S. at 309-310.

2. <u>The Rejection Of Economic Justifications Reflects The Futility Of Undertaking An Analysis Of Inherently Anticompetitive Conduct, And Serves Well The Underlying Enforcement Purposes Of The Per Se Rule.</u>

The Court has long recognized the virtual futility of analyzing proffered justifications based on alleged pro-competitive effects, the reasonableness of the prices involved, and other economic theories and assumptions. Abstractions of this nature are simply not capable of measurement in any meaningful or objective sense, and do not remotely justify undercutting the certainty and security provided by the per se rule. This was clearly expressed by Justice Black in <u>Northern Pacific Railway</u>:

> [The] principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for

> an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken.
>
> 356 U.S. at 5. See also Maricopa County, 73 L.Ed.2d at 62-63.

The same principle was articulated by Justice Marshall in Topco Associates:

> The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.
>
> 405 U.S. at 609-610.

In short, the Court has been singularly disinclined over the years to "ramble through the fields of economic theory," Topco Associates, 405 U.S. at 609 n. 10, endeavoring to make absolute

and concrete that which is by nature abstract, illusive and theoretical. Such an exercise would be fraught with great uncertainties, Trans-Missouri Freight Association, 166 U.S. at 331, and multi-faceted and forever changing competitive environments, Socony-Vacuum, 310 U.S. at 221, and would necessitate an exhaustive analysis of our economic organization and a choice between rival economic philosophies, Trenton Potteries, 273 U.S. at 398. Such complications present "a problem that no human ingenuity could solve." International Harvester Co. v. Kentucky, 234 U.S. 216, 223 (1914). As Justice Holmes therein observed:

> [T]he elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community ... has to be supposed differently organized and subject to other influences than those under which it acts.

Id. at 223.

Moreover, the Court has long been cognizant of the adverse enforcement consequences of such economic gymnastics. Eighty-six years ago, in the Courts' opinion in Trans-Missouri Freight Association, Justice White remarked that:

> It is quite apparent, therefore, that it is exceedingly difficult to formulate even the terms of the rule itself which should govern in the matter of determining what would be reasonable rates for transportation. While even after the standard should be determined there is such an infinite variety of facts entering into the question of what is a reasonable rate, no matter what standard is adopted, that any individual shipper would in most cases be apt to abandon the effort to show the unreasonable character of a charge, sooner than hazard the great expense in time and money necessary to prove the fact, and at the same time incur the ill will of the road itself in all his future dealings with it.

166 U.S. at 332.

As fundamentally, the very undertaking of such an appraisal would

dramatically alter the goal of the Sherman Act--economic freedom.

> In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended.

Socony-Vacuum, 310 U.S. at 221.

Thus, it is now firmly established that economic second-guessing as to the expediency of any particular price fixing scheme, or the wisdom of the Sherman Act itself, will not remove such activities from per se condemnation under the Act. Maricopa County, 73 L.Ed.2d at 60; National Society of Professional Engineers, 435 U.S. at 690; Trenton Potteries, 273 U.S. at 399; and Standard Oil, 221 U.S. at 65. Such questions, requiring, as they do, the substitution of judicial wisdom for the clear mandate of the act, Standard Oil, 221 U.S. at 65, are simply not open for resolution by the

courts, Thomsen v. Cayser, 243 U.S. at 85, Standard Sanitary Mfg., 226 U.S. at 49, Addyston Pipe, 175 U.S. at 238. As stated in Socony-Vacuum, "Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive." 310 U.S. at 221. See also McKesson & Robbins, 351 U.S. at 310.

In the words of Justice Stone:

> [F]or whatever difference of opinion there may be among economists as to the social and economic desirability of an unrestrained competitive system, it cannot be doubted that the Sherman Law and the judicial decisions interpreting it are based upon the assumption that public interest is best protected from the evils of monopoly and price control by the maintenance of competition.

273 U.S. at 397.

In short, economic arguments and theories submitted to the Court are misdirected. As stated in McKesson & Robbins:

> We need not concern ourselves with such speculation. Congress has marked the limitations beyond which price fixing cannot go. We are not only bound by those limitations but we are bound to construe them strictly, since resale price maintenance is a privilege restrictive of a free economy.
>
> 351 U.S. at 316.

See also Simpson v. Union Oil, 377 U.S. at 17; and Northern Pacific Railway, 356 U.S. at 4.

Moreover, there are major benefits which stem from application of the per se rule's conclusive presumption of illegality and the attendant rejection of justifications based on economic abstractions: certainty as to the illegality of price fixing schemes and elimination of the need for complex and prolonged--and so often futile--economic analysis of entire industries in order to determine the effect of such activities. Maricopa County, 73 L.Ed.2d at 58; Broadcast Music, 441 U.S. at 8 n. 11;

Topco Associates, 405 U.S. at 609 n. 10; Northern Pacific Railway, 356 U.S. at 5. The per se rule is thus a valid and useful tool of antitrust policy and enforcement. Broadcast Music, 441 U.S. at 8.

Application of the rule may occasionally condemn price manipulation programs which, under some scenario, might enhance competition. Reality, on occasion, may appear to conflict with the public interest. Topco Associates, 405 U.S. at 612-613 (concurring opinion of Justice Blackmun). Such anomalies, however, are inevitable under any broad statutory scheme.[25] As Justice Stevens observed in Maricopa County:

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25 See Ethyl Gasoline, 309 U.S. at 461 ("the decree rightfully suppressed [the licensing device] even though it had been or might continue to be used for some lawful purpose"); Trans-Missouri Freight Association, 166 U.S. at 337 ("no law can be enacted ... for the control of human affairs that in its enforcement does not produce some evil results").

> As in every rule of general application, the match between the presumed and the actual is imperfect. For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full blown inquiry might have proved to be reasonable.
>
> 73 L.Ed.2d at 58.

Application of the rule is a matter of balancing the advantages of the rule and the protection thereby afforded against the likelihood of anomalous application. The former outweighs the latter by a substantial margin.

> Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them.
>
> Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977).

See also Maricopa County, 73 L.Ed.2d at 58-59 n. 16 and 63 ("Those claims of enhanced competition are so unlikely to

prove significant in any particular case that we adhere to the rule of law that is justified in its general application.").

3. <u>The Court Has Previously Rejected The "Traditional" Justifications For Resale Price Maintenance Now Advanced By Monsanto And The United States. It Has Properly Concluded That The Competitive Dangers Of Resale Price Maintenance Substantially Outweigh The Theoretical Advantages.</u>

The justifications for resale price maintenance now advanced are neither new nor unique. In rejecting the price maintenance scheme involved in <u>Simpson v. Union Oil</u>, the Court was mindful of the justifications "traditionally advanced for resale price maintenance," i.e., the need to protect dealers' profit margins, the need to maintain dealers' reputations as people handling premium quality products, and the need to maintain a "competitive relationship" between dealers' prices and the prices of competitors. 377 U.S. at 19 n. 6. In

Albrecht v. The Herald, the Court, after remarking upon the inconclusive nature of empirical data on the subject, recognized "as a theoretical matter" certain situations in which a manufacturer would regard price maintenance to be in its interests, including the need to assure dealer services, advertising and promotion. 390 U.S. at 151 n. 7. Justice Harlan's dissent[26] in that case summarily rejected justifications now offered by Monsanto:

> Resale price maintenance ... lessens horizontal intrabrand competition. The effects, higher prices, less efficient use of resources, and an easier life for the resellers, are the same whether the price maintenance policy takes the form of a horizontal conspiracy among resellers or of vertical dictation by a manufacturer plus reseller acquiescence. This means two things. First, it is frequently possible to infer a combination of resellers behind what is presented to the world as a

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26 Justice Harlan dissented on the issue of maximum, rather than minimum, price maintenance.

> vertical and unilateral price policy, because it is the resellers and not the manufacturer who reap the direct benefits of the policy. Second, price floors are properly considered per se restraints, in the sense that once a combination to create them has been demonstrated, no proffered justification is an acceptable defense. Following the rule of reason, combinations to fix price floors are invariably unreasonable: to the extent that they achieve their objective, they act to the direct detriment of the public interest as viewed in the Sherman Act. In the absence of countervailing fair trade laws, all asserted justifications are, upon examination, found wanting, either because they are too trivial or elusive to warrant the expense of a trial ... or because they run counter to the Sherman Act premises ... .

390 U.S. at 157.

In light of the broad spectrum of policy considerations underlying the Sherman Act--the social and political as well as the economic--and the policy, rationale and enforcement advantages of the per se rule, it is evident that on

balance, the threat to competition presented by price maintenance programs far outweighs the theoretical justifications offered by Monsanto and disciples of the "Chicago school"[27] of economic thought.[28] Unfettered competition is the mandated standard against which such rarefied theories are to be judged, and that standard condemns resale price maintenance because of the dangers to our competitive system thereby presented. The dangers are numerous.

First, price maintenance facilitates the creation, implementation and enforcement of horizontal price fixing conspiracies, both at the manufacturing level[29] and at subsequent levels in the

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27 See, Litvack, Government Antitrust Policy: Theory Versus Practice and the Role of the Antitrust Division, 60 Texas L. Rev. 649 (1982); Posner, The Chicago School of Antitrust Analysis, 127 U. Pa. L. Rev. 925 (1975).

28 See Pitofsky, The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions, 78 Columbia L. Rev. 1, 2 (1978).

chain of distribution, i.e., wholesale and retail.[30] Under the guise of resale price maintenance, the opportunity for manufacturer collusion with other manufacturers, or for the collusive involvement of manufacturers in collusion between its distributors or dealers, is increased substantially, complete with a built-in means of policing and rigid enforcement. Moreover, in industries involving relatively few manufacturers, price maintenance enhances the manufacturers' ability to maintain

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29 See, e.g., B.S.Yamey, Resale Price Maintenance 10-12 (B.S. Yamey ed. 1966); Comanor, Vertical Territorial and Customer Restrictions: White Motor and its Aftermath, 81 Harv. L. Rev. 1419, 1426 (1968); Levmore, Rescuing Some Antitrust Law: An Essay on Vertical Restrictions and Consumer Information, 67 Iowa L. Rev. 981, 986 (1982).

30 See, e.g., L. Sullivan, Handbook of the Law of Antitrust 383 (1977); Andersen, The Antitrust Consequences of Manufacturer-Suggested Retail Prices--The Case for Presumptive Illegality, 54 U. Wash. L. Rev. 763, 785 (1979).

"imperfect competition." See Simpson v. Union Oil, 377 U.S. at 22 n. 9.

Second, price maintenance raises prices. The experience with fair trade laws, which previously allowed price maintenance under the Miller-Tydings and McGuire Acts, cost the consuming public literally billions of dollars in higher prices.[31] A Department of Justice study indicates that resale price maintenance under the fair trade laws cost consumers in excess of $2 billion a year; and another Department study estimates the fair trade laws increased prices by 18%-27%.[32] International experience reveals the same consequences.[33]

Third, the price uniformity

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31 H.R. Rep. No. 94-341, 94th Cong., 1st Sess. 3-4 n. 11 (1975), and S. Rep. No. 94-466, 94th Cong., 1st Sess. 3 n. 12 (1975).

32 1975 U.S. Code Cong. & Ad. News 1569, 1572

33 See note 31. See also, B. S. Yamey, supra, at 3; Comanor, supra, at 1437; S. Hollander, Resale Price Maintenance 67, 85, 96 (B. S. Yamey ed. 1966).

resulting from resale price maintenance protects inefficient distribution systems by insulating manufacturers, distributors and dealers from the competitive demands for efficiency, innovation and service.[34]

Fourth, the resale prices set by a distant manufacturer pursuant to price maintenance programs are inherently less responsive to the immediate demands of local markets than prices determined by distributors and dealers whose very existence and livelihood depend upon price flexibility to meet those demands. Price maintenance programs place the distributors and dealers at the mercy of manufacturers, and replace their independent business judgment with the less sensitive and perhaps erroneous judgment of the manufacturer. The goals and interests of the two are not coextensive. Each operates at a

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34 See, e.g., B. S. Yamey, supra, at 4, 5; Comanor, supra, at 1434; L. Sullivan, supra, at 381.

different level of distribution, and the distributors and dealers need at all times the freedom to respond to the unique competitive demands of their respective markets, as interpreted by them, in accordance with their independent business judgment.[35]

Fifth, price maintenance limits--indeed, eliminates-- the choice of consumers as to the price premiums they are willing to pay for the services and prestige theoretically made possible by price maintenance programs.[36]

Finally, there is simply no guarantee that resale price maintenance will truly increase dealer services as

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35 See, e.g., L. Sullivan, supra, at 377, 382, 387, 388; Andersen, supra, at 780.

36 See, e.g., B. S. Yamey, supra, at 3, 13; Gerhart, The "Competitive Advantages" Explanation for Intrabrand Restraints: An Antitrust Analysis, 1981 Duke Law J. 417, 435 (1981); Comanor, supra, at 1430; Andersen, supra, at 788; S. Hollander, Restraints Upon Retail Competition 13 (1965).

its proponents, on the basis of theoretical assumptions, anticipate.[37]

These dangers clearly mandate recourse to the numerous alternatives unrelated to resale prices now available to manufacturers as a means of addressing the marketing concerns which the

37 See, e.g., Gerhart, supra, at 431-432; B. S. Yamey, supra, at 14; Stewart and Roberts, Viability of the Antitrust Per Se Illegality Rule: Schwinn Down, How Many to Go?, 58 Wash. U. L. Q. 727, 755 (1980). There is a more plausible explanation for a manufacturer imposing resale prices--resale price maintenance allows a manufacturer to maintain at a higher level the wholesale prices it charges its dealers. By employing resale price maintenance, a manufacturer who has differentiated its product from that of a competitor, perhaps only through name brand recognition, is able to protect its dealers' profit margins, i.e., the difference between wholesale and resale prices. Without this protection, intrabrand price competition might reduce dealer margins to the extent that it becomes unprofitable for the dealer to carry the manufacturer's product. By insulating its dealers from intrabrand price competition, a manufacturer is able to maintain higher wholesale prices, all at the expense of the consuming public.

proponents of price maintenance advance as justifications for such programs.

First, manufacturers can integrate vertically, and directly accomplish that which the proponents would accomplish by indirection.[38]

Second, they can, through contracts, impose upon their distributors and dealers objective standards relating to sales volume, service, advertising and promotion, good will and prestige by which their performance will be judged, and their contracts either renewed or terminated.[39]

Third, they can adopt a distribution program based on true agency or consignment relationships.[40]

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38 See, e.g., Comanor, supra, at 1435; L. Sullivan, supra, at 380; Levmore, supra, at 983.

39 See, e.g., B. S. Yamey, supra, at 9, 14; L. Sullivan, supra, at 386.

40 See, e.g., United States v. General Electric Co., 272 U.S. 476 (1926). See also Sullivan, supra, at 388, 389 (distinguishing General Electric and Simpson v. Union Oil Co., 377 U.S. 13 (1964) and detailing the

Fourth, manufacturers can themselves deal directly with the marketing concerns most frequently advanced as justifications for price maintenance. If a manufacturer wants to insure a certain level of service, promotion and advertising, it can undertake such activities itself on behalf of its distributors and dealers, and/or directly reimburse its distributors and dealers for the expense thereof.[41] If a manufacturer seeks to enhance the "prestige" of its product through price alone, it can simply raise the price to its distributors and dealers.[42]

Moreover, regardless of recourse to any such alternatives, a manufacturer can nonetheless adopt a sales program in

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methods by which a manufacturer could legally further such a relationship).

41 See, e.g., B. S. Yamey, supra, at 14; Andersen, supra, at 788; Levmore, supra, at 983, 987; Gerhart, supra, at 433.

42 L. Sullivan, supra, at 377, 386.

accordance with the course charted by Colgate and its progeny.[43] If adopted as a result of a truly independent, unilateral business decision, and administered as such, a manufacturer will, if the benefits of price maintenance are as real as its proponents would have one believe, be able to fulfill its resale price goals.[44]

C. Any Change In The Scope And Application Of The Per Se Rule Is A Matter For Action By The Congress.

If a change in the scope or application of the per se rule is to be made, the nature and extent of the change is a matter for action by the Congress. As emphasized in Maricopa County:

> Our adherence to the per se rule is grounded not only on economic prediction, judicial convenience, and business

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43 See note 15.

44 Indeed, the failure of such a program--whether through distributor turn-over or price erosion--eloquently condemns the economics of price maintenance.

> certainty, but also on a recognition of the respective roles of the judiciary and the congress in regulating the economy. ... Given its generality, our enforcement of the Sherman Act has required the court to provide much of its substantive content. By articulating the rules of law with some clarity and by adhering to rules that are justified in their general application, however, we enhance the legislative prerogative to amend the law. The respondents' arguments against application of the per se rule in this case therefore are better directed to the legislature. Congress may consider the exception that we are not free to read into the statute.
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> 73 L.Ed.2d at 65.

See also Topco Associates, 405 U.S. at 609 n. 10 and 612-613 (concurring opinion of Justice Blackmun); Socony-Vacuum, 310 U.S. at 222; and Trans-Missouri Freight Association, 166 U.S. 340.

V
ARGUMENT:
EVEN A RECORD AS SIMPLE AS THAT HYPOTHESIZED BY MONSANTO WOULD CONTAIN SUFFICIENT EVIDENCE FOR THE INFERENCE OF A CONSPIRACY IN A RESALE PRICE MAINTENANCE DEALER TERMINATION CASE

A. A Jury Is Entitled To Draw Any Reasonable Inference From The Evidence Presented At Trial.

It is hornbook law that a jury is entitled to draw from evidence presented at trial any reasonable inference supported by that evidence. As long as reasonable minds can differ on the inferences to be drawn, the conclusion reached by a jury must be upheld. This is the essence of the jury's function--to select from amongst conflicting inferences, based upon the evidence presented, that which it considers most reasonable. A verdict reached in this manner must be upheld regardless of whether the court might consider different inferences or conclusions more

reasonable. See, Tennant v. Peoria & Pekin Union Ry. Co., 321 U.S. 29, 35 (1944); and Tiller v. Atlantic Coast Line R. Co., 318 U.S. 54, 68 (1943). Moreover, a jury's conclusion can be based upon an aggregation of facts and events which, when isolated and viewed separately, may seem insignificant. See, Continental Ore. v. Union Carbide and Carbon Corp., 370 U.S. 690, 696-699 (1962); and Gunning v. Cooley, 281 U.S. 90, 94 (1930). Since conspiracies are seldom capable of direct proof, such facts and events frequently serve as the circumstantial basis for the inference of a conspiracy. See, Eastern States Retail Lumber Dealers' Assoc. v. United States, 234 U.S. 600, 612 (1914).[45]

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45 No express agreement is necessary to prove a conspiracy; an illegal agreement may be inferred from all of the circumstances. See, American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

B. <u>Even A Case Based On The "Three Neutral Circumstantial Facts" Posited By Monsanto Should Be Allowed To Go To A Jury</u>.

Notwithstanding such settled law, Monsanto would have the decision below reversed because the Seventh Circuit allowed the jury to perform this very function. By describing the record in terms that bear little resemblance to the record set forth in Spray-Rite's brief, Monsanto hypothesizes a record simple in the extreme, and argues sufficiency of the evidence on that basis. Even that record, however, consisting only of the "three neutral circumstantial facts" posited by Monsanto,[46] would not justify the result sought by Monsanto.

If the record was truly as simple as Monsanto claims, consisting only of evidence that a manufacturer was concerned about resale prices, that dealers complained about another dealer's

46 Brief Of Petitioner Monsanto Company, p. 33.

prices, and that the dealer complained of was subsequently terminated, the evidence that was _not_ presented would itself become evidence of the most convincing nature. _See Interstate Circuit v. United States_, 306 U.S. 208, 226 (1939).

For example, during the trial of a dealer termination case based on a claim of collusive resale price maintenance, a defendant manufacturer would have an opportunity to introduce substantial evidence to justify its termination of a dealer--if the termination was truly legitimate, i.e. based on an independent, unilateral decision pursuant to a suggested resale price program adopted in accordance with the clear requirements of _Colgate_ and its progeny. A manufacturer would eagerly explain to the jury the business reasons for such a program, the manner in which it was adopted and implemented, and the manner in which the program was administered. It could thus

counter the inference of collusion by demonstrating the independent and unilateral nature of the decision making process pursuant to which the program was adopted, and the rationale for the program.

To rebut an inference of conspiracy being drawn from the fact of dealer complaints about prices, a manufacturer could present evidence establishing the manner in which such complaints were directed to it, e.g., whether they were unsolicited and discouraged, rather than solicited and encouraged, and whether they were ignored or routinely dismissed, rather than providing the basis for follow-up activities and communications with the dealer or others.

The inference of collusive termination could be countered with proof establishing entirely legitimate reasons for the termination. If, using Monsantos' examples, a manufacturer was

truly concerned with the degree of dealer promotion and service, the dealer's failure to perform satisfactorily could be demonstrated by reference to objective criteria and by comparison to the performance of other dealers. The inference that price cutting was the cause of the termination could be negated by proof of price structures and the extent to which other dealers cut prices without termination. The timing of the termination itself could be probative of the innocent nature of the termination. Was the dealer terminated immediately upon the manufacturer's gaining knowledge of the price-cutting, or did numerous meetings, consultations and visitations to induce compliance with the price maintenance program occur prior to termination?

Monsanto, however, would simply have the Court relieve a defendant manufacturer from having to present such

justifications to a jury. The ruling advocated by Monsanto would enable a manufacturer to avoid its obligations at trial by convincing a court that certain economic theories suggest that justifications _might_ have existed which _might_ have justified the termination. However, the substitution of a jury's inferences based on evidence presented at trial with judicial speculation regarding possible economic justifications which might have existed and which might have been presented during trial is an obvious distortion of the law.

VI
CONCLUSION

The Amici States respectfully submit that the decision below should be affirmed.

Dated: July 12, 1983.

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No. 82-914

In the Supreme Court of the United States

OCTOBER TERM, 1982

MONSANTO COMPANY, PETITIONER

v.

SPRAY-RITE SERVICE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether evidence that some distributors of a product complained to the manufacturer about the pricing activities of a particular distributor, coupled with the manufacturer's subsequent termination of that distributor, is sufficient to permit an inference that the termination was the result of concerted action between the complaining distributors and the manufacturer, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1.

2. Whether nonprice vertical restrictions can be deemed per se violations of Section 1 of the Sherman Act merely because they are alleged to be part of a resale price maintenance scheme, precluding inquiry into the competitive effect of those restrictions.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-914

MONSANTO COMPANY, PETITIONER

v.

SPRAY-RITE SERVICE CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcement of the federal antitrust laws, has a substantial interest in assuring that the Sherman Act is construed in a manner that most effectively advances the Act's objective of protecting the Nation's competitive economic system.

STATEMENT

1. Petitioner Monsanto Company ("Monsanto") manufactures chemical products, including agricultural herbicides. Respondent Spray-Rite Service Corporation ("Spray-Rite") was engaged in the wholesale agricultural chemical business from 1955 to 1972; it was a low-margin, high volume business whose owner and president was its sole salesman. Spray-Rite bought herbicides from Monsanto and other manufacturers, and resold them to retail dealers and farmers in northern Illinois and adjacent

areas (Pet. App. A-2; J.A. A-100; Pltff. Exh. 201; Tr. 95, 164, 594).[1] This lawsuit arises out of Monsanto's refusal to renew its distribution agreement with Spray-Rite in 1968 (Pet. App. A-3).

During the period at issue, Monsanto sold its herbicides primarily through a network of about 100 independent, nonexclusive, wholesale distributors, including Spray-Rite (Pet. App. A-2 to A-3). While Monsanto assigned each distributor a geographic area of primary responsibility, the distributors could sell outside their areas, and the areas of responsibility overlapped; for example, 25 Monsanto distributors had primary areas that overlapped to varying degrees with Spray-Rite's (see *id.* at A-2; Tr. 1519-1525).[2]

Monsanto and other firms produce various corn herbicides to improve crop yields (Tr. 3217-3222). By the late 1960's, Monsanto's sales accounted for 15% of the corn herbicide market, while its chief competitor, Geigy, "dominated the market" with a 70% share (Tr. 2881, 3303-3305; J.A. A-114). Monsanto was dissatisfied with this situation and sought to improve its efforts to educate retail dealers and farmers about the technical advantages of its products (Tr. 3236-3245).[3] Accordingly, in 1967 Monsanto informed its distributors, including Spray-Rite, that it would reappoint them only for one-year terms, based on compliance with six criteria, including: (1) whether the distributor's primary activity was soliciting sales to retail herbicide dealers; (2) whether the distributor em-

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[1] In 1968, Spray-Rite styled itself as a "brokerage house." Pltff. Exh. 19; Tr. 976-978.

[2] This was not uncommon. The court of appeals noted that Monsanto assigned approximately 10 to 20 distributors to each area. Pet. App. A-2.

[3] Great care must be taken in the selection and application of herbicides, taking into account the location, soil, weather, and the like; selecting an inappropriate herbicide or misapplying an appropriate one can result either in the failure of the herbicide to deal with the problem it was purchased to solve, or even in serious damage to crops. *E.g.*, Tr. 915-917, 946-952.

ployed trained sales personnel capable of implementing Monsanto's new customer education programs for retail dealers and farmers; and (3) whether the distributor was "exploit[ing] fully" the herbicide market in its area of primary responsibility (Pet. App. A-3; J.A. A-59 to A-61). After Monsanto's market position deteriorated even further in 1968—its herbicide sales decreased 30% from 1967 (Tr. 3243)—Monsanto introduced a new herbicide, reduced the distributor and suggested retail prices of a second herbicide, suggested that distributor profit margins be reduced, changed its shipping policies to provide for free delivery only within the distributor's primary area of responsibility, and began to give cash bonuses to distributors who participated in Monsanto's technical schools or made technical presentations to retail dealers and farmers concerning Monsanto products (Pet. App. A-3). This marketing program seems to have had the desired effect: in the four years following implementation of the new policies, Monsanto nearly doubled its share of the corn herbicide market from 15% to 28%, at the expense of the dominant manufacturer (J.A. A-114 to A-115).

In the fall of 1968, Monsanto informed Spray-Rite that its distributorship would not be renewed. At that time, 80% of Spray-Rite's herbicide sales were sales of Geigy products; only 16% were sales of Monsanto products (see Pet. App. A-3; Tr. 932-942).[4]

Herbicide distributors often engaged in price cutting (*e.g.*, Tr. 2234) and over the years Monsanto had received numerous complaints from its distributors about the low resale prices of other distributors (Tr. 181, 184), including Spray-Rite (Pet. App. A-16).[5] Spray-Rite's president testified that on one occasion Monsanto threatened that "retaliation was going to take place" if he did

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[4] Even so, Spray-Rite was Monsanto's tenth largest distributor of one herbicide. Pet. App. A-3.

[5] One Spray-Rite witness testified that "it was standard practice" for Monsanto distributors to complain about one another; "[i]f it didn't happen it would be like snowing in July." Tr. 184.

not follow the suggested resale prices (Tr. 711). But Monsanto did not receive any complaints about Spray-Rite's pricing or discuss Spray-Rite's status with other distributors during the year prior to its decision not to renew Spray-Rite (Tr. 1379-1403). After the nonrenewal in 1968, Spray-Rite continued to sell herbicides, including Monsanto products purchased from other distributors (Pltff. Exh. 133; Tr. 912-915), until it ceased operations in 1972 (Pet. App. A-4).

2. Spray-Rite then sued Monsanto, alleging that the refusal to renew its distributorship, combined with a post-termination boycott by Monsanto and its distributors, had forced Spray-Rite out of business and that Monsanto and its distributors had conspired to implement a resale price maintenance scheme (J.A. A-3). Monsanto denied engaging in resale price maintenance, argued that its marketing program consisted of legitimate nonprice restrictions designed to improve the efficiency of its distribution system, and contended that the termination was a unilateral act prompted by Spray-Rite's failure to satisfy Monsanto's announced distributorship criteria.

In answering three special interrogatories, the jury found for Spray-Rite on each of its three theories of per se violation.[6] The jury returned a general verdict against Monsanto, assessing damages of $3.5 million, which were trebled by the district court. See 15 U.S.C. 15.

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[6] The interrogatories read as follows (J.A. A-27 to A-28):

1. Was the decision by Monsanto not to offer a new contract to plaintiff for 1969 made by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices on Monsanto herbicides?

2. Were the compensation programs and/or areas of primary responsibility and/or shipping policy created by Monsanto pursuant to a conspiracy or combination with one or more of its distributors to fix, maintain or stabilize resale prices of Monsanto herbicides?

3. Did Monsanto conspire or combine with one or more of its distributors so that one or more of those distributors would limit plaintiff's access to Monsanto's herbicides after 1968?

3. The court of appeals affirmed (Pet. App. A-1 to A-42). First, the court noted that Monsanto had received numerous complaints about Spray-Rite's pricing and subsequently terminated Spray-Rite; the court held that evidence "of termination following competitor complaints is sufficient to support an inference of concerted action" (*id.* at A-15). Second, the court held that Monsanto's marketing program—the territorial assignments, distributor education and compensation programs and shipping policy—was properly deemed per se unlawful, rather than analyzed under the rule of reason, because it was alleged to be "part of an unlawful scheme to fix prices" (*id.* at A-12). Finally, the court ruled that the jury was instructed properly on Spray-Rite's boycott claim and that there was sufficient evidence to support the jury's verdict (*id.* at A-9 to A-11, A-18).[7]

SUMMARY OF ARGUMENT

1. The court of appeals erred in holding that evidence of distributor complaints, followed by termination, sufficed to prove concerted action between Monsanto and distributors other than Spray-Rite. This decision undermines the crucial distinction in Section 1 of the Sherman Act, 15 U.S.C. 1, between collective and unilateral conduct. Any manufacturer faces numerous choices in deciding how its product can be marketed in the manner most likely to assure success against rival products. For those companies that choose to sell through distributors, it is the distributors who may have the best perception of how marketing policies fare in practice. Accordingly, the flow of information from distributors to manufacturers can be highly beneficial in devising strategies for interbrand competition. By using such communications as the lever for find-

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[7] Monsanto has not sought certiorari on the boycott issue. See Pet. 3-4 n.4. However, the jury's award of damages did not attribute a particular amount to any of the three alleged antitrust violations, nor did Spray-Rite adduce particularized evidence on that subject. Pet. App. A-18 to A-25.

ing a per se violation, the court of appeals would place in jeopardy all manufacturers who follow the helpful, and often procompetitive, practice of listening to their distributors.

2. The court of appeals also erred in holding that a marketing program—which on its face involved nonprice arrangements designed to promote effective interbrand competition—is per se illegal merely because it is alleged to have had an effect on price. This holding is contrary to *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977), which held that nonprice measures are subject to analysis under the rule of reason. *Sylvania* recognized that such practices may enhance interbrand competition, which is "the primary concern of antitrust law" (*id.* at 52 n.19), and thus do not warrant per se condemnation. But the decision below would undermine *Sylvania* by avoiding the competitive analysis this Court required merely because an effect on price is alleged. Since even the arrangements involved in *Sylvania* would probably affect price, the decision below would largely undo *Sylvania* as a practical matter.

This suggests a more fundamental reason why the court of appeals' decision should be vacated. There is no sound basis for assuming, as courts have since *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), that resale price maintenance is so invariably anticompetitive as to justify per se condemnation. In many cases, resale price maintenance may have the same effect as the nonprice measures *Sylvania* removed from the category of per se offenses: they may be highly procompetitive and enhance consumer welfare by stimulating interbrand rivalry. Resale price maintenance may be anticompetitive in certain contexts; but abandonment of the per se standard would not require courts, in order to identify those contexts, to engage in the protracted proceedings that the rule of reason is sometimes thought to entail. There are readily ascertainable objective criteria for determining whether, in a particular market, resale price maintenance

is likely to have adverse effects. In cases where these criteria are not satisfied there is justification neither for extended factual inquiry nor for automatic condemnation; and in cases where adverse effects may exist, liability will still be imposed. But the overbroad rule that prohibits all resale price maintenance, without regard to its actual impact in the marketplace, is unwarranted; it disserves consumers by precluding beneficial practices along with those that are pernicious.

ARGUMENT

I. EVIDENCE THAT DISTRIBUTORS OF A PRODUCT COMPLAINED TO THE MANUFACTURER ABOUT ANOTHER DISTRIBUTOR, COUPLED WITH THE SUBSEQUENT TERMINATION OF THE LATTER DISTRIBUTOR, IS INSUFFICIENT TO PROVE THAT THE TERMINATION WAS THE RESULT OF CONCERTED ACTION BETWEEN THE COMPLAINING DISTRIBUTORS AND THE MANUFACTURER

The court of appeals held that a terminated distributor can prove the element of concerted action required by Section 1 of the Sherman Act, 15 U.S.C. 1, simply by showing: (a) that the manufacturer received complaints about the plaintiff's pricing from other distributors; and (b) that the manufacturer subsequently terminated the plaintiff (Pet. App. A-15 to A-16). This holding misconstrues the nature of unlawful agreements under the Sherman Act, conflicts with the decisions of other courts of appeals, and threatens seriously adverse consequences to the efficient functioning of vertical distribution systems.

1. The principal concern underlying Section 1 is that firms in direct competition will combine to coordinate their decisions and eliminate rivalry among themselves.[8] Accordingly, a manufacturer's independent decisions about

[8] See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977) ("[i]nterbrand competition * * * is the primary concern of antitrust law").

the pricing and distribution of its product do not violate Section 1, for the statute bars only concerted activities in restraint of trade. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307 (1919). Indeed, a manufacturer's freedom unilaterally to regulate the distribution of its product so as to win customers from its rivals is the very essence of competition.[9] To permit proof of a Section 1 violation to rest merely on complaint-and-termination evidence, as the court of appeals did, undermines Section 1's crucial distinction between collective and unilateral conduct, because such evidence does not in itself identify concerted action that may adversely affect competition.

It is often in a manufacturer's self-interest to terminate a dealer who violates a distributional restriction or otherwise disrupts the manufacturer's sales strategy. As the Seventh Circuit itself recently observed in *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 678 F.2d 742, 744 (1982):

> If a supplied wants his distributors to emphasize nonprice rather than price competition, which * * * is the usual reason why he would restrict his distribution, he will be hostile to price cutters because they will make it harder for his other distributors to recoup the expenditures that he wants them to make on presale services to consumers and on other forms of nonprice competition, and of course the undersold distributors will be equally or more hostile.

Such a coincidence of desires, standing alone, can no more support the inference of conspiracy in a dealer termination case than can evidence of consciously parallel conduct support such an inference in a case of horizontal price fixing.[10] Rather, something more is needed

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[9] See *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, *supra*, 433 U.S. at 56; *Davis-Watkins Co.* v. *Service Merchandise*, 686 F.2d 1190, 1196 (6th Cir. 1982), petition for cert. pending, No. 82-848.

[10] Compare *Theatre Enterprises, Inc.* v. *Paramount Film Distributing Corp.*, 346 U.S. 537, 541 (1954), with *Eastern States Retail Lumber Dealers Association* v. *United States*, 234 U.S. 600 (1914), and *Interstate Circuit, Inc.* v. *United States*, 306 U.S. 208,

to permit the trier of fact to infer that the supplier and complaining distributors had "a common design and understanding, or a meeting of minds in an unlawful arrangement"—the essence of the agreement element of a Section 1 violation. *American Tobacco Co.* v. *United States*, 328 U.S. 781, 810 (1946).[11]

To infer concerted action (in the absence of direct evidence of collusion)[12] requires a showing that the conduct

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227 (1939). See Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv. L. Rev. 655, 659 (1962).

[11] It is for this reason that four courts of appeals have concluded that evidence of the sort deemed dispositive by the court of appeals here—dealer complaints and subsequent termination—reflects a common occurrence so often devoid of competitive significance that, standing alone, it cannot support a finding that termination was the result of concerted action between the complaining dealers and the manufacturer. *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc.*, 637 F.2d 105, 111, 115-117 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981); *Bruce Drug, Inc.* v. *Hollister, Inc.*, 688 F.2d 853, 856-857 (1st Cir. 1982); *Schwimmer* v. *Sony Corp.*, 677 F.2d 946, 952-953 (2d Cir. 1982), cert. denied, No. 82-277 (Nov. 8, 1982); *H.L. Moore Drug Exchange* v. *Eli Lilly & Co.*, 662 F.2d 935, 941-945 (2d Cir. 1981), cert. denied, No. 81-2215 (Oct. 4, 1982); *Davis-Watkins Co.* v. *Service Merchandise, supra*, 686 F.2d at 1199.

On the other hand, the Fourth Circuit recently followed the rule enunciated by the Seventh Circuit here. *Bostick Oil Co.* v. *Michelin Tire Corp.*, 702 F.2d 1207 (4th Cir. 1983). And two panels of the Eighth Circuit have reached conflicting results on this issue. Compare *Battle* v. *Lubrizol Corp.*, 673 F.2d 984, 991-992 (1982) (concluding that complaint-and-termination evidence is sufficient to prove agreement) with *Roesch, Inc.* v. *Star Cooler Corp.*, 671 F.2d 1168, 1172 (1982) (concluding that it is not). In October 1982, those two cases were reargued before the Eighth Circuit sitting en banc; a decision is expected soon. The United States filed a brief as amicus curiae in the en banc proceeding in *Battle*, urging that *Battle* be vacated and *Roesch* affirmed.

[12] Mere communication between distributor and supplier, such as occurred here, is not in itself sufficient to prove collusion. Cf. *Smith* v. *Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 948 (6th Cir. 1983) ("Close ties between [alleged co-conspirators] * * * are not, by themselves, sufficient predicates for inferring the existence of a conspiracy to restrain trade"). Nor does such communication involve the danger to competition posed by advance exchange of price

is not in the individual self-interest of the participants, acting independently, and is in their collective and self-interest only when they coordinate their actions.[13] It is "not enough to show that [the complaining distributors], acting separately * * * wanted to get rid of a competitor; there must also be evidence that in terminating [the plaintiff, the supplier] was acceding to their desire rather than acting to promote an independent conception of its self-interest." *Valley Liquors, supra,* 678 F.2d at 744. At most, the evidence deemed sufficient by the court of appeals here is probative only of the existence of parallel desires on the part of Monsanto and some of its distributors to see Spray-Rite terminated, and provides no guidance on whether these parallel desires were the result of collusion.

2. The standard adopted by the court of appeals would impede the flow of information between a manufacturer and its distributors that is crucial to the operation of efficient distribution systems, and thus would injure consumer interests that the Sherman Act is meant to protect.[14] Distributors are in a position to obtain considera-

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information by competitors. Cf. *United States* v. *Container Corp.*, 393 U.S. 333 (1969).

[13] See *Valley Liquors, supra,* 678 F.2d at 744; *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc., supra,* 637 F.2d at 111, 114; *Bogosian* v. *Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), cert. denied, 434 U.S. 1086 (1978).

[14] See *Edward J. Sweeney & Sons, Inc.* v. *Texaco, Inc., supra,* 637 F.2d at 111 n.2, citing P. Areeda, *Antitrust Analysis* 560 (2d ed. 1974). Unlike horizontally competing firms, a manufacturer and its distributors must constantly coordinate their activities to assure that their product will reach the consumer in an efficient manner. If the manufacturer cannot rely on its distributors to inform it about the operation of the distribution system, it will have to employ some alternative monitoring system at additional cost. See P. Kotler, *Marketing Management* 553-555 (2d ed. 1972); see also F. Warren-Boulton, *Vertical Control of Markets* 13-21 (1978); O. Williamson, *Markets and Hierarchies: Analysis and Antitrust Implications* 20-40, 102-103 (1975).

Moreover, a dealer who maintains low prices either is a highly-prized dealer to the manufacturer, often having atypically low costs

ble insight into their supplier's distribution system and into inefficiencies that may arise from either the design of the system or the manner in which it is implemented. Distributors who would benefit from a more efficient system have an incentive to communicate their ideas for improvement to the supplier, and the supplier has an obvious incentive to implement efficiency-enhancing ideas, even if they require terminating some distributors. In practical effect, however, the Seventh Circuit's rule could virtually immunize dealers from termination once a competitor has complained. Suppliers who maintain good communications with their distributors would be rendered powerless to take action against disruptive dealers who threaten the efficient operation of their distribution systems, unless the suppliers are willing to run the risk of incurring treble damages with no opportunity to show the procompetitive nature of their actions.[15] This is not, after all, a situation involving communications between competitors—which is the prime concern of Section 1—but between persons who are cooperating in the sale of a single product and who have ongoing contractual relationships.[16]

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and generating substantial sales volumes, or else is a potentially disruptive dealer that may be cutting costs by free-riding on the marketing programs of other dealers. See page 15, *infra*. Even a manufacturer that is making no effort to control resale price has good reasons for monitoring the operations of such price-cutting dealers.

[15] See Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. Chi. L. Rev. 6, 12-13 (1981). Distributors routinely complain to suppliers about the supposed price-cutting activities of competing distributors; Spray-Rite itself made such complaints to Monsanto. Tr. 181; see note 5, *supra*. Indeed, the supplier's first information about an infraction often will come in the form of complaints by other distributors.

[16] Another adverse consequence of the court of appeals' rule stems from its open-ended nature: so long as termination follows at *any* time subsequent to the complaint, the jury may infer concerted conduct. There was no evidence that Monsanto received any complaints about Spray-Rite during the entire year preceding its termination, see page 4, *supra*; yet the court of appeals held that com-

This Court should reject the court of appeals' extraordinarily broad interpretation of the concerted action requirement, an interpretation that fails to require more than ambiguous evidence, and threatens to disrupt long-established and competitively sound methods of dealer-manufacturer communications.[17]

II. THE COURT OF APPEALS INCORRECTLY HELD THAT MONSANTO'S MARKETING PROGRAM WAS SUBJECT TO ANTITRUST SCRUTINY UNDER THE PER SE RULE

As noted above, at about the time of Spray-Rite's nonrenewal, Monsanto instituted a new marketing program, including territorial assignments for distributors, compensation for distributors who participated in Monsanto's new customer education programs, and free delivery of herbicides to locations within the distributor's primary area of responsibility. The court of appeals erred in ruling that the jury could find this new marketing program to be a per se violation of Section 1 merely because it was alleged to have an effect on price, and thus to be part of a resale price maintenance scheme (Pet. App. A-11 to A-13).[18] By permitting the line between non-

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plaints made two to four years previously were sufficient evidence that Monsanto acted, not unilaterally, but in concert with its distributors.

[17] Spray-Rite has contended (Br. in Opp. 19-24), that there was more evidence at trial of the alleged agreement between Monsanto and its distributors than the complaint-and-termination evidence relied on by the court of appeals. On remand, the court of appeals would be free to consider whether there was sufficient evidence in addition to the complaints and termination to support the conclusion that the termination resulted from an unlawful agreement between Monsanto and its distributors.

[18] Spray-Rite also contends (Br. in Opp. 21-23), that it did more than merely allege a connection between the nonprice policies and a price-fixing scheme, *i.e.*, that it proved the connection and that the jury so found. But the court of appeals' analysis, on its stated terms, found the allegation itself to be dispositive (Pet. App. A-13);

price and price arrangements to be blurred in this way, the court of appeals' ruling undermines the approach adopted by this Court in *Sylvania* and threatens to stifle many types of procompetitive nonprice measures taken by manufacturers to improve their products' competitive position. More fundamentally, the court of appeals' decision exposes the difficulties inherent in analyzing "non-price" vertical restrictions under the rule of reason, while treating vertical price restrictions—resale price maintenance—as unlawful per se.

A. In The Absence of Evidence Connecting Monsanto's Marketing Program to a Resale Price Maintenance Scheme, the Challenged Practices and Restrictions Are Nonprice Vertical Restrictions That Should Be Tested Against the Rule of Reason

1. Although the Sherman Act, read literally, prohibits all restraints of trade that result from concerted action, this Court long has held that it precludes only those restraints that are "unreasonably restrictive of competitive conditions." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 58 (1911); accord, *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 690 (1978). The unreasonableness of a restraint of trade must be established by either (1) evidence that the restraint is demonstrably anticompetitive in the circumstances of the case (the rule of reason), or (2) a conclusive presumption of unreasonableness based on the general character of the challenged conduct (the per se rule). See *Professional Engineers, supra*, 435 U.S. at 687-692; *Sylvania, supra*, 433 U.S. at 49-50; *Northern Pacific Ry.* v. *United States*, 356 U.S. 1, 5 (1958). The rule of reason is the normal test of the legality of a re-

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the court expressly linked the invocation of a per se approach to Spray-Rite's allegations and not to the proof at trial. This statement of the law is incorrect and would be an inappropriate standard for decision in future cases. Should this Court reverse, it would remain for the court of appeals on remand to decide whether Spray-Rite proved its allegations.

straint; the per se rule is employed only in those limited circumstance where courts have had considerable experience with the type of conduct challenged, and consistently have found the conduct to cause a "pernicious effect on competition and [to] lack any redeeming virtue." *Northern Pacific, supra,* 356 U.S. at 5; see *Broadcast Music, Inc.* v. *CBS,* 441 U.S. 1, 8 (1979). In either event, "the purpose of the analysis is to form a judgment about the competitive significance" of the alleged restraint. *Professional Engineers, supra,* 435 U.S. at 692.

2. In *Sylvania,* this Court held that nonprice vertical restrictions present sufficient procompetitive potential to preclude per se treatment. 433 U.S. at 49-50. Although the Court only ten years before in *United States* v. *Arnold, Schwinn & Co.,* 388 U.S. 365 (1967), had ruled that distributional restrictions similar to those involved in *Sylvania* were illegal per se, the Court, upon reexamination, overruled *Schwinn* and held that such vertical restrictions do not invariably have the necessary "pernicious effect on competition" to justify per se condemnation. *Sylvania, supra,* 433 U.S. at 58. This Court stated in *Sylvania* (*id.* at 54) that while vertical restrictions "reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers," they also "promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." Because of these opposing competitive effects, the Court concluded that antitrust plaintiffs should be required to prove that particular nonprice vertical restrictions are anticompetitive.[19]

As *Sylvania* recognized, many products require considerable pre-sale promotion and post-sale assistance in or-

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[19] On remand in *Sylvania,* the Ninth Circuit held that the nonprice vertical restrictions there were reasonable: "The restraint was likely to promote interbrand competition given the market structure in the television manufacturing industry * * *." 694 F.2d 1132, 1140 (9th Cir. 1982).

der to enhance consumer acceptance and demand. Some manufacturers may determine that their product is most competitive with other brands when these services are offered without separate charge to the consumer, with the cost being calculated into the retail price of the product.[20] In order to persuade dealers to offer such services, manufacturers must either compensate the dealers directly or somehow enable the dealers to earn the higher gross margins necessary to defray the costs attributable to providing the services. Otherwise, dealers offering "free" ancillary services will have their prices undercut by, and lose sales to, dealers who have lower costs because they offer no such services. The prospect of "free-riding" by some dealers on the promotional and educational services of other dealers diminishes the incentives of dealers generally to offer these services in amounts necessary to ensure the most effective distribution. As a result, fewer of the manufacturer's products find their way into the market—to the detriment of consumers.

Sylvania recognized that in some circumstances non-price vertical restrictions that constrain intrabrand competition are a legitimate and socially desirable way to cure the "free-rider" problem and to promote interbrand competition. See 433 U.S. at 54-55. Because Monsanto's marketing program on its face did not pertain to price, it falls squarely within that class of vertical restrictions that *Sylvania* held to be subject to rule of reason analysis. There is no evidence that, prior to adopting the new marketing program, Monsanto consulted with any distributors concerning its desirability. Rather, Monsanto perceived that demand for its products was unnecessarily

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[20] For example, a manufacturer may conclude it would be beneficial for its product to be sold with a service warranty that would be honored by retailers. Should some retailers sell the product without offering repair and maintenance services, consumers would be left with the less convenient alternative of sending the product to the manufacturer or with no recourse at all. The result would be an increase in complaints and the loss of the good-will the manufacturer had hoped to generate.

low because many potential customers understood neither which Monsanto herbicides were appropriate for particular farming needs, nor the proper method of applying the products (Tr. 3237-3238); the dealer and farmer education programs were aimed at solving these problems (Tr. 3239, 3244-3247). After the new program was implemented, Monsanto significantly increased its share of the corn herbicide market (from 15% to 28% in a four-year period) at the expense of the dominant manufacturer (whose market share fell from 70% to 55%) (J.A. A-114 to A-115). This evidence strongly suggests that Monsanto's marketing program had exactly the type of procompetitive effects that *Sylvania* was intended to encourage.

3. Although Monsanto's marketing program had no direct effect on price, Spray-Rite contended below that it had the indirect effect of making it economically undesirable for Monsanto distributors to sell to Spray-Rite, thus preventing Spray-Rite from purchasing sufficient quantities of Monsanto herbicides at low enough prices to engage in price competition.[21] But many restrictions commonly regarded as nonprice vertical restrictions, including the location clause at issue in *Sylvania*, may have an upward effect on the resale price of the manufacturer's products.[22] For example, a manufacturer may create ex-

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[21] See Spray-Rite's brief filed in the court of appeals, at 19-25; Tr. 4254-4256 (argument at close of trial). For example, Spray-Rite's expert witness testified that Monsanto's creation of primary areas of distributor responsibility and free delivery of herbicides within those areas had the effect of "precluding" Monsanto distributors from selling to persons outside their areas, including Spray-Rite (Tr. 2668), and that the compensation program encouraged sales to retailers and thereby discouraged sales to nonretailers, such as Spray-Rite. Tr. 2668, 2675-2676; see Pet. App. A-19, A-23.

[22] Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, *supra*, 48 U. Chi. L. Rev. at 11-12; Baker, *Interconnected Problems of Doctrine and Economics in the Section One Labyrinth: Is Sylvania a Way Out?*, 67 Va. L. Rev. 1457, 1467-1470 (1981).

clusive territorial distributorships, a practice that is economically indistinguishable from the practice involved in *Sylvania* and one that has been held subject to rule of reason analysis,[23] even though one probable effect of this arrangement is to limit intrabrand price competition.

Any time a manufacturer attempts to ensure that its goods receive a more costly type of treatment at the point of sale—as Monsanto did here—the manufacturer must cope with potential "free riders" who undersell those dealers that comply with the manufacturer's marketing program. To the extent that the manufacturer is successful in eliminating the free-rider problem and encouraging its dealers to provide demand-enhancing services, the vertical restrictions will raise the resale price of the product indirectly, as dealers attempt to recover the additional costs of those services. But although vertical restrictions increase both dealer costs and price, such restrictions will be unprofitable for the manufacturer unless they also increase the quantities of product that dealers sell. This is the critical, procompetitive respect in which such vertical restrictions differ from a mere widening of dealer margins, which would increase price but *reduce* the quantities of product sold. Indeed, the manufacturer usually will anticipate that its marketing program will enable its dealers to increase their prices, precisely so that they can recover their added costs. That is true whether the manufacturer uses restricted sales territories, location clauses, exclusive dealing arrangements, or some other vertical restriction.

But if any dealer who refuses to abide by a manufacturer's marketing plan could establish a per se violation of Section 1 simply by showing that the manufacturer's

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[23] *E.g., Ron Tonkin Gran Turismo, Inc.* v. *Fiat Distributors, Inc.*, 637 F.2d 1376, 1385-1388 (9th Cir.), cert. denied, 454 U.S. 831 (1981); see *Copy-Data Systems, Inc.* v. *Toshiba America, Inc.*, 663 F.2d 405, 408-411 (2d Cir. 1981); R. Posner, *Antitrust Law, An Economic Perspective* 160 (1976); Baker, *supra*, 67 Va. L. Rev. at 1515-1518.

"nonprice" arrangement has lessened price competition in some way, then the rule of *Sylvania* would be seriously undermined.[24] After all, Spray-Rite conceded at trial that it had not attempted to prove that Monsanto's marketing program violated Section 1 when analyzed under the rule of reason (Tr. 3982-3984). In this context, the court of appeals' transmutation of those practices into per se violations solely on the basis of a claim that they were part of a price-fixing scheme, as shown by their effect on price, effectively negates *Sylvania*'s careful treatment of nonprice vertical restrictions and threatens to chill the efforts of manufacturers to implement numerous procompetitive vertical marketing decisions.[25]

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[24] Indeed, under the decision below, a dealer could immunize itself against termination by underselling its competitors, even if this is accompanied by a variety of departures from the manufacturer's nonprice policies. Should the dealer be terminated, it could contend that this action was triggered by its price-cutting and, hence, that the termination was part of a price-fixing scheme. Under the Seventh Circuit's holding, this would suffice to establish per se liability. Even a distribution plan that would be lawful under *Sylvania* could be held hostage by such tactics.

[25] The court of appeals concluded that *Sylvania* was not controlling (Pet. App. A-12); instead, the court relied (*ibid.*) on *United States* v. *Sealy, Inc.*, 388 U.S. 350 (1967). *Sealy*, however, involved horizontal restraints, as this Court expressly stated. *Id.* at 352. The decision in *Sealy* correctly recognizes that a distinction exists between horizontal and vertical cases, with a different standard for determining liability applicable to each. *Id.* at 354. As noted above (page 15, *supra*), there was no evidence that Monsanto adopted the programs here as a result of horizontal collusion among its distributors.

In contrast to the court of appeals' rule here, two other courts have held that the fact that a distribution restriction indirectly exerts some pressure on dealers' prices is not enough to transform a nonprice arrangement into resale price maintenance. *Butera* v. *Sun Oil Co.*, 496 F.2d 434, 437-438 (1st Cir. 1974); *JBL Enterprises, Inc.* v. *Jhirmack Enterprises, Inc.*, 519 F. Supp. 1084, 1088-1089 (N.D. Cal. 1981), aff'd, 698 F.2d 1011 (9th Cir. 1983).

B. The Court of Appeals Should Not Have Presumed Monsanto's Marketing Program to Have Been Unlawful Even If It Was Adopted as Part of a Resale Price Maintenance Scheme

Even if the evidence shows that Monsanto adopted the challenged marketing program as part of a resale price maintenance scheme, this Court should still vacate and remand because resale price maintenance should not be deemed per se unlawful.

1. The Court should take this opportunity to consider whether resale price maintenance, alone among vertical restrictions, should always be deemed unlawful, as the Court first ruled 70 years ago in *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 404-409 (1911). As discussed below, the logic of *Sylvania* compels the conclusion that resale price maintenance—like other vertical restrictions—is unsuitable for per se treatment.[26] It is true that Monsanto has denied engaging in resale price maintenance; but the per se unlawful status of that practice has been universally assumed by courts for so long and the consequences of being adjudged to have engaged in the practice are so severe—treble damages and possible felony prosecution—that few antitrust defendants can be expected to concede participating in such an agreement, a concession that is necessary as a matter of litigation strategy if they wish to argue that the practice was procompetitive.[27] For 70 years, then, it has been unlikely that the per se status of resale price maintenance would be placed directly in issue by an antitrust

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[26] The similarities in purpose and effect between resale price maintenance and nonprice vertical restrictions led Justice White to observe in his concurring opinion in *Sylvania* that the "effect * * * of the Court's opinion is necessarily to call into question" the per se rule against resale price maintenance. 433 U.S. at 70.

[27] For this reason, antitrust defendants have not given the Court any occasion to look carefully at the actual competitive effects of resale price maintenance. See, *e.g.*, *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 36-38 (1960); *United States* v. *Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944).

defendant. At the same time, the record here suggests that resale price maintenance may be competitively justified in certain cases, see pages 21-23, *infra*, and the court of appeals' decision clearly illustrates the risks of failing to perform any competitive analysis at all.

Nor should the longevity of the *Dr. Miles* rule shield it from inquiry about whether it in fact furthers consumer welfare. This Court often has recognized the broad mandate that Congress has given it in interpreting the Sherman Act so as to promote competition,[28] and the Court has not been reluctant to reconsider previous antitrust decisions whose economic rationales have been called into question.[29]

2. This Court has always regarded the rule of reason as the normal test of the legality of an alleged restraint; per se rules are invoked only where economic and judicial experience have shown that certain practices invariably have a "pernicious effect on competition" and lack "any redeeming [competitive] virtue." *Sylvania*, *supra*, 433 U.S. at 49-50; see pages 13-14, *supra*. The Court recognized in *Sylvania* that this policy is particularly appropriate in the case of vertical marketing arrangements between manufacturers and distributors of a product, for such arrangements typically are conducive to intense interbrand competition. See 433 U.S. at 51-53. Accordingly, a per se rule against resale price maintenance can be justified only if there is some persuasive basis for suppos-

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[28] *E.g.*, *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, No. 81-334 (Feb. 22, 1983), slip. op. 12; *Professional Engineers*, *supra*, 435 U.S. at 688. See *United States* v. *Associated Press*, 52 F. Supp. 362, 370 (S.D.N.Y. 1943) (3-judge court), aff'd, 326 U.S. 1 (1945) (in deciding Sherman Act cases, the courts have "a legislative warrant, because Congress * * * has delegated to the courts the duty of fixing the standard of each case").

[29] See, *e.g.*, *Sylvania*, *supra*, 433 U.S. at 58-59 (overruling *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967)); *Simpson* v. *Union Oil Co.*, 377 U.S. 13, 22-25 (1964) (effectively overruling *United States* v. *General Electric Co.*, 272 U.S. 476 (1926)).

ing that the practice reduces output, retards innovation, or otherwise interferes with Sherman Act goals. But the Court has never analyzed resale price maintenance in terms of its actual economic effects, much less found that those effects are so necessarily anticompetitive as to justify a per se ban. Such an analysis would show that resale price maintenance, like the nonprice vertical restrictions in *Sylvania*, can have significant procompetitive effects.

3. a. Resale price maintenance is not likely to be used by manufacturers merely as a way to raise resale prices; there are simpler—and safer—ways to do that.[30] Rather, a manufacturer who employs resale price maintenance usually will be attempting to provide to distributors an incentive to handle its product in a way that the manufacturer expects will be advantageous in interbrand competition. See generally Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J. L. & Econ. 86, 89-96 (1960); R. Posner, *Antitrust Law, An Economic Perspective* 148-149 (1976). Resale price maintenance can have the same types of procompetitive effects recognized in *Sylvania* as possible consequences of nonprice vertical restraints. By eliminating intrabrand price competition, the manufacturer may enable its distributors to provide costly promotional, warranty, or other ancillary services and thereby increase the attractiveness of the product. Indeed, it is the indirect lessening of price competition by nonprice vertical restrictions that eliminates the free-rider problem and gives such restrictions their procompetitive potential. See pages 15-16, *supra*. Price-related vertical restrictions in general, and resale price maintenance in particular, accomplish directly what nonprice vertical restraints accomplish indirectly: both types of

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[30] If mere elevation of resale price were the manufacturer's purpose, the manufacturer could simply raise its own price to the distributor and keep the higher revenues commensurate with that higher price.

practice are designed to increase both price and sales volume.[31]

There often will be several ways in which a manufacturer can preserve his distributors' service incentives in the face of potential free riders; as this Court recognized in *Sylvania*, exclusive territories are one effective and reasonable method. See 433 U.S. at 54-59. But, as Professor (now Judge) Posner has explained, resale price maintenance

> is more flexible than exclusive territories as a method of limiting price competition among dealers, and it may be the only feasible method where effective retail distribution requires that dealers be located close to one another; any free-rider or other arguments that are available to justify exclusive territories are equally available to justify resale price maintenance.[32]

In this case, assuming that Monsanto sought to restrict the freedom of its distributors to set resale prices, the record indicates that such a restriction had significant procompetitive effects. Monsanto had an apparently good reason to desire that expert point of sale advice be available to dealers and farmers who purchased its herbicides (see note 3, *supra*). Moreover, Monsanto was in the process of introducing a new herbicide (see Pet. App. A-3) whose commercial success might depend on careful and

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[31] This Court has recognized that resale price maintenance can increase output by inducing dealers to engage in "demand-creating activity" (such as product promotional activities) that may, in certain cases, outweigh the loss of sales that might have been made in the absence of resale price maintenance. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 151 n.7 (1968). See *Sylvania*, *supra*, 433 U.S. at 69-70 (White, J., concurring).

[32] Posner, *supra*, 48 U. Chi. L. Rev. at 9. See Telser, *supra*, 3 J.L. & Econ. at 91-92. The likelihood of a free-rider problem is increased where, as in Monsanto's distribution system, numerous distributors serve the same area, so that the promotional efforts of one distributor will benefit others in its area.

expert point-of-sale instruction.[33] The evidence shows that Monsanto's new policies apparently had the desired effect, not of decreasing quantities sold as a mere price increase would do, but of increasing demand and making Monsanto's herbicides more competitive in the interbrand market. See page 3, *supra*.

b. Of course, resale price maintenance also can cause adverse competitive effects at which the antitrust laws properly are aimed. But the existence of the conditions under which such adverse effects might occur usually are ascertainable through examination of a limited set of objective factors, and, when such effects are demonstrated, the practice will be unlawful under the rule of reason. Virtually all of the adverse competitive effects of resale price maintenance will occur: (1) where a group of manufacturers attempts to use the practice to police and strengthen a cartel among themselves; or (2) where one or more of a manufacturer's distributors, in order to exercise market power or form or police a cartel, coerce the manufacturer (and perhaps other suppliers) to impose an inefficient resale price maintenance system—one that reduces quantities sold—for the benefit of the coercing distributors.

The first concern cannot arise unless the market structure indicates some reasonable likelihood of collusion. If, for example, concentration at the manufacturing level is low or if only a small fraction of output is sold subject to vertical price arrangements, allegations that such arrangements are being used to facilitate manufacturer collusion are implausible on their face. In other situations, market characteristics such as minimal entry costs, high entry and exit rates, or particular product characteristics, may minimize the probability that collusion could occur even in the presence of a "facilitating" vertical price arrangement. In at least some cases, these market charac-

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[33] Cf. Telser, *supra*, 3 J.L. & Econ. at 95-96; Bowman, *The Prerequisites and Effects of Resale Price Maintenance*, 22 U. Chi. L. Rev. 825, 840-843 (1955).

teristics will so thoroughly negate the possibility of an anticompetitive effect arising from the challenged practice that further inquiry is unnecessary.

Similarly, market characteristics may negate the possibility of an anticompetitive effect resulting from dealer coercion: if the coercing dealers, individually or collectively, lack market power in the resale market, they will be unable to prevail against the manufacturer's own interests in maintaining an efficient distribution system. And even if the dealers have the market power necessary to subvert the manufacturer's distribution system, they will have no incentive to do so unless the manufacturer itself has market power that the dealers hope to exploit—for without market power, the manufacturer cannot succeed in sustaining a higher price for the benefit of its dealers without disproportionately large losses of volume.[34]

4. Given the actual competitive effects of resale price maintenance, there is no basis for this Court to assume, as it has since the *Dr. Miles* decision in 1911, that resale price maintenance is so unfailingly anticompetitive as conclusively to be presumed unlawful in all situations. See, *e.g.*, *Rice* v. *Norman Williams Co.*, No. 80-1012 (July 1, 1982); *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 102 (1980). See generally Levi, *The Parke, Davis-Colgate Doctrine: The Ban on Resale Price Maintenance*, 1960 Sup. Ct. Rev. 258.

a. Indeed, the Court's few discussions of the basis for the per se ban during the last 70 years have not been consistent in justifying the rule. In *Dr. Miles*, the Court first relied on the common law proposition that "a general restraint upon alienation is ordinarily invalid." 220 U.S. at 404. The Court then concluded that resale price maintenance is a practice in which the manufacturer has little economic interest; rather, "the advantage of established

[34] Conversely, if the market characteristics allow the possibility of anticompetitive effects and no free-rider problem is apparent, then in the absence of a showing by the defendant that the particular resale price maintenance system promotes competition, it should be deemed unlawful.

retail prices primarily concerns the dealers" and thus is equivalent to a horizontal price fixing agreement among dealers. 220 U.S. at 407-408.[35] But this explanation cannot be supported: a price-fixing combination at the retail level would tend to reduce quantities sold and thereby damage a manufacturer's objectives—an economic effect that would bear little resemblance to the consequences of resale price maintenance sought by a manufacturer who chooses to institute such a system. See pages 21-22, *supra*; R. Posner, *Antitrust Law*, *supra*, at 152-153.[36]

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[35] In analogizing resale price maintenance to a horizontal arrangement among dealers, the Court observed that such behavior has for its "sole purpose the destruction of competition and the fixing of prices." 220 U.S. at 408. This logic has no place in a case involving a vertical arrangement that on its face involves nonprice measures to which the per se test does not apply. See *Sylvania*, *supra*. Such measures do not have for their "sole purpose" the fixing of prices.

[36] Justice Holmes dissented from the *Dr. Miles* decision on the ground that resale price maintenance had not been shown to be anticompetitive on balance, see 220 U.S. at 411-413, and (with Justice Brandeis) continued to dissent from decisions presuming resale price maintenance to be unlawful. *United States* v. *A. Schrader's Son, Inc.*, 252 U.S. 85, 100 (1920); *FTC* v. *Beech-Nut Packing Co.*, 257 U.S. 441, 456-457 (1922). In his dissent in *Dr. Miles*, Justice Holmes urged that the

> point of most profitable returns [to the manufacturer] marks the equilibrium of social desires and determines the fair price in the only sense in which I can find meaning in those words. The [manufacturer] knows better than we do what will enable it to do the best business. * * * I cannot believe that in the long run the public will profit by * * * permitting [retailers] to cut reasonable prices for some ulterior purpose of their own and thus to impair, if not to destroy, the production and sale of articles which * * * the public should be able to get.

220 U.S. at 412. More recent observers have expressed the same view. *E.g.*, R. Bork, *The Antitrust Paradox* 33, 288-290 (1978).

The *Dr. Miles* majority's reliance on the Elizabethan law of restraints on alienation has been criticized for decades. See Chafee, *Equitable Servitudes on Chattels*, 41 Harv. L. Rev. 945, 983 (1928); R. Bork, *The Antitrust Paradox*, *supra*, at 284-285. As this Court noted in *Sylvania*: "We quite agree * * * that 'the state of the common law 400 or even 100 years ago is irrelevant to the issue [of]

And in any event, a dealer cartel would be per se unlawful even in the absence of a hard and fast rule on resale price maintenance.[37]

Many years after *Dr. Miles*, in *Simpson* v. *Union Oil Co.*, 377 U.S. 13 (1964), the Court justified the condemnation of resale price maintenance on the ground that the practice "was being used to [deprive] independent dealers of the exercise of free judgment." 377 U.S. at 16. Condemned in *Dr. Miles* because it was thought to be indistinguishable from a retailer cartel, the practice now was characterized as a manufacturer's device for exploiting dealers. And in *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968), the Court found that a system of maximum resale pricing intended to prevent price gouging by distributors was per se unlawful because it subjected the marketplace to the "perhaps erroneous judgment of a seller" in setting the price level and tended to "acquire all the attributes of an arrangement fixing minimum prices." 390 U.S. at 152-153; footnote omitted.[38] But neither *Dr. Miles* nor *Simpson* had suggested that the antitrust laws were intended to prevent sellers from making mistakes in pric-

the effect of the antitrust laws upon vertical * * * restraints in the American economy today." 433 U.S. at 53 n.21.

[37] While it is theoretically possible that a group of distributors might fix a price at the same level that a manufacturer would choose to have his goods resold, this is highly unlikely. The manufacturer would attempt to choose a resale price level that would stimulate demand-enhancing promotional or service activities by its dealers and thus would increase output; his interest in maximizing profits and society's interest in enhancing output (and promoting interbrand competition) generally will coincide. By contrast, if the dealer cartel were to set the price, it would find that a still higher price, causing a reduction in demand from that which would result from the manufacturer's preferred price, would yield greater profits to the cartel members; the cartel would attempt to maximize its profits at the expense of restricting overall output of the product below the socially optimal level. Thus, horizontal dealer price-fixing poses great dangers not present in resale price maintenance by a manufacturer and therefore is properly subject to per se prohibition.

[38] See Baker, *supra*, 67 Va. L. Rev. at 1486 n.96.

ing, and such a purpose is antithetical to the very notion of competition; if sellers are to be free to compete with one another, they must have the freedom to make mistakes, and sellers should pay the price for those mistakes in the marketplace, not in treble damage actions.

b. Although the *Sylvania* Court itself suggested possible reasons why resale price maintenance might be treated differently from "nonprice" vertical restraints, see 433 U.S. at 51 n.18, the Court neither ruled on that question nor reexamined the conflicting justifications posited in *Dr. Miles*, *Simpson*, and *Albrecht*. None of the concerns expressed in *Sylvania* justifies the continued characterization of resale price maintenance as a per se offense.

First, the Court noted the possibility that industrywide resale price maintenance might facilitate cartelization. But while that concern might be borne out in a particular case, see pages 23-24, *supra*, it is properly addressed on a case-by-case basis, since cartels—whether at the manufacturer or dealer level—are per se illegal in themselves; such a concern provides little justification for an absolute ban.[39] Second, the Court suggested that resale price maintenance might reduce competition among competing brands. But at least in cases where a court finds that market and product characteristics negate the possibility that resale price maintenance resulted in anticompetitive effects, per se condemnation of the practice would unjustifiably deprive consumers of the benefit of intensified interbrand competition.

Third, *Sylvania* cited Congress' repeal in 1975 of the Miller-Tydings and McGuire Acts (the "Fair Trade" laws) that had permitted resale price maintenance at the option of individual states. But there is no incongruity between Congress' action eight years ago and a more flexible treatment of resale price maintenance under the Sherman Act. In repealing the broad per se legality afforded by the Fair Trade laws and once again sub-

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[39] *See* R. Bork, *The Antitrust Paradox*, *supra*, at 292-294; *Posner, The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev. 1, 7-8 (1977).

jecting resale price maintenance systems to antitrust scrutiny, Congress did not delineate the standard for such scrutiny.[40] Nor do the views of some legislators in 1975 concerning the competitive effects of resale price maintenance offer much assistance in discerning the meaning of a statute enacted 85 years previously.[41] It thus remains for this Court to "give shape to the statute's broad

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[40] Both the House and Senate reports on the 1975 legislation indicate Congress' awareness that by repealing the Fair Trade laws, they were remitting resale price maintenance to *Dr. Miles'* per se ban. See H.R. Rep. No. 341, 94th Cong., 1st Sess. 3 (1975) ("House Rep."); S. Rep. No. 466, 94th Cong., 1st Sess. 1-2 (1975). But the legislative history suggests that Congress merely intended to end a special "exemption from the Federal antitrust laws" that had existed for many years and that could no longer be justified, see House Rep., *supra*, at 5; it does not suggest that in returning resale price maintenance to its pre-Fair Trade status as a per se offense, Congress also intended to freeze that status and deprive the courts of their long-acknowledged flexibility to interpret the Sherman Act's general language in accordance with improved understanding of commercial realities.

[41] " '[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.' " *CPSC* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 117-118 (1980); see *United States* v. *Clark*, 445 U.S. 23, 33 n.9 (1980); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 132 (1974); *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282 (1947). This principle is fully applicable to post-passage congressional views about the scope of the antitrust laws. See *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348-349 (1963).

Congress' views about resale price maintenance—and *Dr. Miles*—have varied over the years. In 1937, after prolonged debate on the competitive effects of resale price maintenance, the Miller-Tydings bill was passed to place "the stamp of approval upon price maintenance transactions under State [fair trade laws], notwithstanding the Sherman Act of 1890." 81 Cong. Rec. 8138 (1937) (statement of Rep. Dirksen); see H.R. Rep. No. 382, 75th Cong., 1st Sess. 2 (1937); 81 Cong. Rec. 7495-7496 (1937) (statement of Sen. Tydings); 81 Cong. Rec. 8140 (1937) (statement of Rep. Culkin). Moreover, almost immediately after this Court narrowly construed the Miller-Tydings exemption in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384 (1951), an overwhelming majority of both houses of Congress passed the McGuire Act—after another lengthy debate on the competitive virtues of resale price mainte-

mandate"[42] by determining whether a per se rule should be applicable, based on the predictable competitive effects of the practice. In the case of resale price maintenance, both the economic evidence and the adverse consequences of the opposite course demonstrate that resale price maintenance should not be treated differently from all other vertical arrangements between manufacturers and their distributors.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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MAY 1983

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nance—to overrule *Schwegmann* and permit State fair trade laws to bind even those dealers who refused to sign resale price maintenance agreements. See H.R. Rep. No. 1437, 82d Cong., 2d Sess. 1-2 (1952); H.R. Rep. No. 1516, 82d Cong., 2d Sess. 4-7, 15 (1952); 97 Cong. Rec. 13404 (1951) (statement of Rep. McGuire); 98 Cong. Rec. 8718-8743 (1952) (Senate debate).

[42] *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, *supra*, slip op. 12; *Professional Engineers*, *supra*, 435 U.S. at 688.

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No. 82-914-CFX
Status: GRANTED

Title: Monsanto Company, Petitioner
v.
Spray-Rite Service Corporation

Docketed:
December 7, 1982

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Bartlit Jr.,Fred H.

Counsel for respondent: Jinkinson,Earl A.

Entry	Date	Note	Proceedings and Orders
1	Dec 7 1982	G	Petition for writ of certiorari filed.
2	Jan 3 1983		Brief amicus curiae of United States filed.
3	Jan 6 1983		Brief of respondent Spray-Rite Service Corp. in opposition filed.
4	Jan 11 1983		Reply brief of petitioner Monsanto Co. filed.
5	Jan 12 1983		DISTRIBUTED. February 18, 1983
6	Feb 15 1983		DISTRIBUTED. February 18, 1983
8	Feb 18 1983	D	Motion of Washington, et al. for leave to file a brief as amici curiae, out-of-time, filed.
9	Feb 24 1983		DISTRIBUTED. February 25, 1983
10	Feb 28 1983		Petition GRANTED. Justice White OUT. **
11	Feb 28 1983		DISTRIBUTED. March 4, 1983. (Motion of WA, et al. for leave to file a brief as amici curiae out-of-time)
12	Mar 7 1983		Motion of Washington, et al. for leave to file a brief as amici curiae, out-of-time, DENIED. Justice White OUT.
15	Mar 30 1983		Order extending time to file brief of petitioner on the merits until May 14, 1983.
16	May 13 1983		Joint appendix filed.
17	May 13 1983		Brief of petitioner filed.
18	May 13 1983		Brief amicus curiae of Natl. Assn. of Manufacturers filed.
19	May 13 1983		Brief amicus curiae of Natl. Agricultural Chemicals Association filed.
20	May 13 1983		Brief amicus curiae of United States filed.
21	May 27 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
23	Jun 1 1983		Order extending time to file brief of respondent on the merits until July 13, 1983.
25	Jun 13 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. to be divided as follows: Counsel for petitioner: 20 minutes; the Solicitor General: 10 minutes. Justice White OUT.
26	Jun 20 1983	G	Motion of Associates for Antitrust Analysis for leave to file a brief as amicus curiae filed.
27	Jun 27 1983		Motion of Associates for Antitrust Analysis for leave to file a brief as amicus curiae GRANTED. Justice White OUT.
28	Jul 11 1983		Brief amicus curiae of Small Business Legal Defense Committee filed.
29	Jul 12 1983		Brief amicus curiae of Senator Metzenbaum, et al. filed.

No. 82-914-CFX

Entry	Date	Note	Proceedings and Orders
30	Jul 13 1983		Brief of respondent filed.
31	Jul 13 1983		Brief amicus curiae of Beverly Hills Bar Association filed.
32	Jul 13 1983		Brief amicus curiae of National Association of Catalog Showroom Merchandisers filed.
33	Jul 13 1983		Brief amicus curiae of Association of General Merchandise Chains, Inc. filed.
34	Jul 13 1983		Brief amicus curiae of Dayton-Hudson Corporation filed.
35	Jul 13 1983		Brief amicus curiae of National Mass Retailing Institute filed.
36	Jul 13 1983		Brief amicus curiae of Service Merchandise Co., Inc. filed.
37	Jul 15 1983		Brief amicus curiae of Forty-Six States filed.
38	Jul 15 1983		Brief amicus curiae of Burlington Coat Factory Warehouse Corp. filed.
39	Aug 2 1983		CIRCULATED.
40	Oct 24 1983		SET FOR ARGUMENT. Monday, December 5, 1983. (3rd case) (1 hour)
41	Nov 9 1983	X	Reply brief of petitioner Monsanto Co. filed.
42	Dec 2 1983	X	Supplemental brief of respondent Spray-Rite Service Corp. filed.
43	Dec 5 1983		ARGUED.
44	Dec 7 1983		Record filed.
45	Dec 7 1983		Certified briefs and appendices received.